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

STARWOOD DIGITAL VENTURES, Appellant, v. DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL, Appellee.	:	CZICB APPEAL NO. 2026-01

DECISION AND FINAL ORDER

Pursuant to due and proper notice of time and place of hearing[1] 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 March 24, 25, and 26, 2026, in the Delaware Department of Natural Resources and Environmental Control's ("DNREC" or the "Appellee") Auditorium, 89 Kings Highway, Dover, Delaware, and via the WebEx virtual platform, concerning an appeal that challenged the issuance of Secretary's Status Decision dated February 3, 2026 (the "Status Decision") by DNREC. The Status Decision determined that Starwood Digital Ventures' ("Starwood" or the "Appellant") Project CZA-448SD (the "Project" or

[1] Public notice was 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.* § 101-16.2.2.

"Appellant's Project") is a heavy industry use, which is prohibited under the Coastal Zone Act, 7 *Del. C.* § 7001 *et seq.* (the "CZA") and the Coastal Zone Act Regulations, 7 *Del. Admin. C.* § 101 *et seq.* (the "CZA Regulations").

The appeal, docketed as CZ-2026-01 (the "Appeal"), was filed by Appellant on February 17, 2026. DNREC and Starwood are collectively referred to herein as the "Parties." The Appeal seeks reversal of the Status Decision, alleging that the Project is not a heavy industry use in violation of the CZA and the CZA Regulations and is otherwise exempted from regulation under the CZA and the CZA Regulations.

The Board consists of a total of nine members, all of whom are voting members.[2] Five of the nine Board members were present, which constituted a quorum pursuant to 7 *Del. C.* § 7006.[3] Board members in attendance were Acting Chairperson Jeffrey Draper, Willie V. Scott, Mary Douglas, C.J. Bell, and Robert Snowden. Deputy Attorney General Nicholas D. Picollelli, Jr., Esq. represented the Board. Jeffrey L. Moyer, Esq., Katharine L. Mowery, Esq., Sara T. Wagner, Esq.,

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[2] *See* 7 *Del. C.* § 7006. Five members are regular members appointed by the Governor and confirmed by the Senate. These regular members are Marcia Fox, Mary Douglas, Jeffrey Draper, Pamela Meitner, and Willie V. Scott. The remaining four serve as ex-officio members and are CJ Bell (Division of Small Business and Tourism), William G. Jester (Kent County Planning Commission), Robert Snowden (New Castle County Planning Board), and Holly Wingate (Sussex County Planning and Zoning Commission).

[3] This section provides, in part that "[a] majority of the total membership of the Board less those disqualifying themselves shall constitute a quorum." 7 *Del. C.* § 7006.

Andrew Rosen, Esq., and Philip K. Micha, Esq. of Richards, Layton & Finger, P.A. represented Appellant. Max B. Walton, Esq., Michael J. Hoffman, Esq., and Grace E. Best, Esq. of Connolly Gallagher, LLP represented Appellee and DNREC's Secretary (the "Secretary").

STATEMENT OF THE CASE AND PROCEEDINGS

By way of brief procedural background, Appellant submitted an initial draft application for the Project on July 31, 2025, and a signed application was submitted on September 8, 2025. Appellant's application was reviewed by DNREC experts, including the Division of Fish and Wildlife, the Division of Water, the Division of Waste and Hazardous Substances, and the Division of Air Quality. Based on the review, DNREC submitted follow-up questions to Appellant and required Appellant to include an emissions scenario based on 500-hours of annual operation per generator.

On October 31, 2025, Appellant filed its revised and final application for a CZA Status Decision within DNREC. A copy of the application is included as Joint Exhibit 2 (hereinafter referred to as "JE-[#]"). The Secretary deemed the application administratively complete on December 1, 2025.

The site of Appellant's proposed Project is located at 0 River Road and 825 Governor Lea Road, New Castle, Delaware. The site includes two contiguous tax parcels, 10-049.00-073 and 12-002.00-025. The Project campus is proposed to have

11 two-story buildings ranging in size from 500,000 sq. ft. to 700,000 sq. ft. and accessible from Hamburg Road and Governor Lea Road. The Project is to include five substations (four substations at 6.9 acres each and one substation at 9.3 acres), one switch station (15.2 acres), equipment yards, parking lots, driveways, and stormwater management areas. The Project's total campus is expected to be approximately 6.1 MM +/- building square feet.

Phase 1 of the Project's campus is expected to include six data centers backed up by 252, 3 MW generators and six, 1.5 MW generators. Phase 2 of the Project's campus is expected to include five data centers, including 252, 3 MW generators and six, 1.5 MW generators. Diesel storage for each of the 516 generators will be double-walled 5,020 gallon belly diesel-fuel reservoirs. Total energy will increase gradually over an 8-10 year period and is expected to total 1.2 GW for both phases combined.

Appellant intends to provide the following services to its customers through the Project: centralized, secure storage for data; data hosting; cloud services; backup and recovery; computing; and connectivity. Appellant's customers are expected to include businesses, healthcare and educational providers, and government agencies to conduct digital transactions worldwide.

Legal notices announcing the receipt and availability of Appellant's CZA Status Decision Application were published in the Daily State News, The News

Journal, on the DNREC public notices webpage, and sent electronically to CZA public listserv on December 10, 2025. Public notices were also posted at the Delaware City Public Library, New Castle Public Library, and Bear Public Library. The public comment period closed on January 12, 2026.

On February 3, 2026, DNREC prepared the Status Decision determining Appellant's Project was prohibited by the CZA as a heavy industry use. A copy of the Status Decision is JE-1. The Status Decision first notes a conflict between the CZA Regulations. JE-1, p. 4-5. The CZA Regulations exempt as "uses not regulated" warehouses or other storage facilities, not including tank farms; facilities used in transmitting distributing, transforming, switching, and otherwise transporting and converting electrical energy; and back-up emergency and stand-by source of power generation to adequately accommodate emergency industry needs when outside supply fails. 7 *Del. Admin. C.* §§ 101-5.12; 101-5.1.5; 101-5.1.8. The Project, according to the Secretary, appears to align with these uses. JE-1, p. 4-5. However, subsection 4.9 of the CZA Regulations state that "[a]ny new tank farm greater than 5 acres in size not associated with a manufacturing use is prohibited as a new heavy industry use." The Project, as proposed, includes some 516 double-walled diesel fuel belly tanks, each capable of storing 5,020 gallons of fuel. JE-1, p.2. The area dedicated to these tanks far exceeds five acres of the project area. The Project also includes 516 smokestacks, one associated with each of the 516

generators, which are another characteristic piece of equipment associated with "heavy industry use" as defined in the CZA. *Id.* Moreover, under certain assumptions about how frequently these generators may in fact operate, the nitrogen oxide emissions associated with these generators could well be the largest source of such emissions in the Coastal Zone, and indeed in the entire state, with the sole exception of the Delaware City refinery. *Id.* at 2-3. With these risks and the intent of the CZA in mind, DNREC and the Secretary concluded that the proposed use is not allowed in the Coastal Zone. *Id.* at 3.

Public Notice of the CZA Status Decision was announced on February 4, 2026. Appellant filed its appeal on February 17, 2026. DNREC did not assert any objection to the timeliness of the Appeal.

On appeal, Appellant contends:

A. The Project is not a prohibited heavy industry use under the CZA.

B. The Project's proposed use of 516 5,020-gallon belly diesel-fuel reservoirs across both Project phases do not constitute a "tank farm" or "tanks" under the CZA or the CZA Regulations and thus are not prohibited.

C. The diesel-fuel generators' exhaust outlets are categorically not "smokestacks" as that term is used in the CZA.

D. The diesel-fuel generators are only for back-up emergency power generation.

E. The Project does not contain most or almost all of the seven attributes of heavy industry use per the statutory definition as required under settled Delaware law.

F. The Project does not closely resemble any of the examples of heavy industry use set forth in 7 *Del. C.* § 7002(d), which include oil refineries, basic steel manufacturing plants, basic cellulosic pulp-paper mills, chemical plants such as petrochemical complexes, and an incinerator structure or facility 5,000 square feet or more.

G. To the extent the Project has industrial components, which is disputed, they are not greater than 20 acres, as required by the CZA, and made clear by settled Delaware law.

H. There is no restriction, statutory or otherwise, on the number of generators that may be present on a project site within the coastal zone.

I. The Secretary's analysis of potential to pollute in his Status Decision was flawed.

J. The Project's potential to pollute is minimal, based on existing regulatory programs and air emission offsets utilized as required.

K. The EPA Guidance relied on by the Secretary is incompatible with the CZA potential to pollute analysis and even if proper to use, it was erroneously applied.

L. The Project's generated nitrogen oxides ("NOx") emissions are anticipated to be approximately 25 tons per year ("tpy") and will be offset as required by acquired emission reduction credits.

M. The Project is exempted from regulation under the CZA, per 7 *Del. Admin. C.* § 101-5.1.

N. The Section 6 criteria in the CZA Regulations do not apply to Status Decisions.

Appellee contends on appeal:

A. The Project's proposed use of 516 5,020-gallon belly diesel-fuel tanks in an area greater than five acres is a tank farm prohibited under the CZA as a "heavy industry use." Altogether, the 516 tanks will comprise approximately 17 acres.

B. In addition to the tank farm, the Project is a hyperscale data center utilizing smokestacks and large-scale power generation. These are all indicators of "heavy industry" in the coastal zone as prohibited by the CZA.

C. The Secretary used the appropriate standard to analyze the Project's potential to pollute.

D. The data center as proposed has a substantial potential to pollute.

E. The Project's 516 generators would far exceed the number of generators located on a site in the Coastal Zone.

F. The highest number of generators at a site in the Coastal Zone is eight.

G. The Project will include at least 516 smokestacks, one associated with each generator. Short smokestacks are far less beneficial than tall smokestacks because the purpose of a smokestack is to disperse pollutants far away from the air people breathe.

H. The Project's facility would generate far more than 25 tons per year of nitrogen oxide (NOx).

I. The Section 6 criteria in the CZA Regulations do not apply to Status Decisions.

J. As proposed, and in light of changes likely to come in regulation of electric power, the Project's generators are not "back up power generation."

K. The Project viewed as a whole is not a "warehouse."

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

On February 17, 2027, Appellant filed a Statement of Appeal.

On March 2, 2026, Appellant filed Appellant's Motion *In Limine* To Preclude Public Comment, Appellant's Position On Recusal, and Appellant's Position On Connolly Gallagher Conflict.

On March 3, 2026, Appellant informed the Board that it would withdraw its Motion *In Limine* to Preclude Public Comment if the Board would allot extra time sufficient to accommodate the Parties' cases as well as public comment.

On March 10, 2026, Appellee filed Appellee's Motion For A Determination That Five Votes Of The Board Are Required To Reverse Or Modify A Status Decision Determination Of The Secretary, Appellee's Motion *In Limine* To Preclude Argument That Appeal Standards For A Status Decision Should Be Treated Differently Than A Permit Decision Under The Statute And Regulations, and Appellee's Motion *In Limine* To Preclude The Board's Consideration Of Constitutional Issues And Ultra Vires Claims Raised By Appellant.

On March 11, 2026, Appellant filed Appellant's Pre-Hearing Memorandum.

On March 16, 2026, Appellee filed Appellee's Response To Appellant's Motion *In Limine* To Preclude Public Comment, Appellee's Response To Appellant's Position On Recusal, and Appellee's Response To Appellant's Position On Connolly Gallagher Conflict.

On March 16, 2026, Appellant filed Appellant's Opposition To Appellee's Motion For A Determination That Five Votes Of The Board Are Required To Reverse Or Modify A Status Decision Determination Of The Secretary, Appellant's Opposition To Appellee's Motion *In Limine* To Preclude Argument That Appeal Standards For A Status Decision Should Be Treated Differently Than A Permit

Decision Under The Statute And Regulations, and Appellant's Opposition To Appellee's Motion *In Limine* To Preclude The Board's Consideration Of Constitutional Issues And Ultra Vires Claims Raised By Appellant.

On March 17, 2026, Appellant formally withdrew its Motion *In Limine* to Preclude Public Comment.

On March 18, 2026, Appellant filed Appellant's Motion *In Limine* To Exclude Evidence.

On March 19, 2026, Appellee filed Appellee's Pre-Hearing Memorandum In Support Of The Secretary's Status Decision On Starwood Digital Ventures' Project CZA-448SD.

On March 19, 2026, Appellee filed Appellee's Corrected Pre-Hearing Memorandum In Support Of The Secretary's Status Decision On Starwood Digital Ventures' Project CZA-448SD.

On March 19, 2026, the Parties filed a Joint Final Pre-Hearing Order.

On March 20, 2026, Appellee filed a Notice of Supplemental Authority.

On March 21, 2026, Appellee filed Appellee's Response To Appellant's Motion *In Limine* to Exclude Evidence.

On March 23, 2026, Appellant filed Appellant's Objections to Appellee's Exhibits, and Appellee filed Appellee's Objections to Appellant's Exhibits.

PRELIMINARY MATTERS

Prior to the Appellant's case in chief, the Board addressed the Parties' remaining motions.

I. Appellant's Position on Recusal

Appellant's Position on Recusal asserts that Board members' membership/participation in the Sierra Club Delaware Chapter may require recusal and proposes Board members be asked the following questions to determine whether recusal is appropriate: (1) whether they are, or have been within the last five years, a member, officer, committee member, donor, or active volunteer of the Sierra Club; (2) whether they participate in, assisted with, or were consulted about any opposition to the Project, including but not limited to the January 12, 2026 Sierra Club Delaware Chapter comment letter or Sierra Club organized public comments regarding the Project; and (3) whether any such position, activity, or participation could reasonably be perceived as affecting their ability to be impartial in hearing and deciding this appeal. This motion was resolved because none of the Board members recused themselves. Hearing Tr. Vol. 1 at 7:1-5, March 24, 2026.

II. Appellant's Position on Connolly Gallagher Conflict

Appellant's Position on Connolly Gallagher Conflict asserts that either Connolly Gallagher must be disqualified or Board member William G. Jester, Chair of the Kent County Planning Commission must recuse himself because Connolly

Gallagher represents the Kent County Planning Commission. This motion was resolved because Mr. Jester did not sit for the hearing. Hearing Tr. Vol. 1 at 6:20-25, March 24, 2026.

III. Appellant's Motion *In Limine* To Exclude Evidence

Appellant's Motion *In Limine* To Exclude Evidence moves to preclude Appellee from presenting or eliciting evidence or argument concerning alleged impacts of the Project on state-wide electricity rates or bulk-power system outages, including testimony and demonstratives premised on generalized ratepayer or grid-reliability effects.

Appellee, in response, contended that they intended to present evidence concerning alleged impacts of the Project on statewide electricity rates or bulk-power system outages, including testimony and demonstratives premised on generalized ratepayer or grid-reliability effects, to essentially contradict the Appellant's contention that the generators for the Project will only be used for limited purposes.

After consideration of Appellant's motion and Appellee's response, the Board denied the request in its entirety to allow Appellee to introduce the contested evidence at the hearing so that the Board could give it due weight and consideration during deliberations. Hearing Tr. Vol. 1 at 9:16-10:4, March 24, 2026. However,

despite denying the motion, the Board allowed a "continuing" or "standing" objection on the basis outlined in the motion, for purposes of appeal. *Id.* at 23:1-9.

IV. Appellee's Motion For A Determination That Five Votes Of The Board Are Required to Reverse Or Modify A Status Decision Determination Of The Secretary

Appellee's Motion For A Determination That Five Votes Of The Board Are Required To Reverse Or Modify A Status Decision Determination Of The Secretary moves for a determination that five votes of the Board are required to reverse or modify a status decision determination of the Secretary pursuant to 7 *Del. C.* § 7006 and 7 *Del. Admin. C.* § 101-16.2.1.

7 *Del. C.* § 7006 provides, in relevant part, that:

> 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.

7 *Del. Admin. C.* § 101-16.2.1 provides, in relevant part, that:

> 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 an appeal of a status decision or permit request.

Appellant, in response, contended that "a majority of the total membership of the Board is needed in order to make a determination less those disqualified." Hearing Tr. Vol. 1 at 13:13-15, March 24, 2026. In other words, "if there were nine members of the Board, and two were disqualified, that would leave seven to make a

determination, and our position would be that a majority of those seven would be needed in order to reverse." *Id.* at 13:16-20.

After consideration of Appellee's motion and Appellant's response, the Board voted unanimously that the Board "need[s] five members … to make a final decision." *Id.* at 17:9-15.

V. Appellee's Motion *In Limine* To Preclude Argument That Appeal Standards For A Status Decision Should Be Treated Differently Than A Permit Decision Under The Statute And Regulations

Appellee's Motion *In Limine* To Preclude Argument That Appeal Standards For A Status Decision Should Be Treated Differently Than a Permit Decision Under the Statute And Regulations moves to preclude argument that appeal standards for a status decision should be treated differently than a permit decision under the CZA and CZA Regulations. If the Board finds differently, then Appellee contends that Appellant lacks the right to appeal the Secretary's Status Decision under the CZA. Appellee agreed this motion was resolved because none of the Board members disqualified themselves before the hearing. Hearing Tr. Vol. 1 at 17:16-18:3, March 24, 2026.

VI. Appellee's Motion *In Limine* To Preclude The Board's Consideration Of Constitutional Issues And Ultra Vires Claims Raised By Appellant

Appellee's Motion *In Limine* To Preclude The Board's Consideration Of Constitutional Issues And Ultra Vires Claims Raised By Appellant moves to preclude the Board's consideration of constitutional issues and ultra vires claims

raised by Appellant because the Board lacks the statutory authority to hear either claim under 7 *Del. C.* § 7007 and the Delaware Administrative Procedures Act. After consideration of Appellee's motion and Appellant's response, the Board voted unanimously to deny the motion and to allow Appellant to make Constitutional and Ultra Vires arguments at the hearing so that the Board could give the arguments due weight and consideration during deliberation. Hearing Tr. Vol. 1 at 20:3-8, March 24, 2026.

MATTERS BEFORE THE BOARD

I. Summary of the Evidence

The Board considered the following exhibits, admitted without objection, and made part of the record:

Exhibit #	Description
JE-1	February 3, 2026 Status Decision
JE-2	October 30, 2025 Final Application for a CZA Status Decision

A. Appellant's Case-in-Chief

The Board considered the following exhibits, admitted with the noted objections, and made part of the record:

Appellant Exhibit #	Description
1	July 31, 2025 Initial Draft Application for a CZA Status Decision Appellee objected to the admissibility of Exhibit 1 as irrelevant under DRE Rule 402 because it is not the final application the Secretary reviewed.

2	September 8, 2026 Signed Application for a CZA Status Decision Appellee objected to the admissibility of Exhibit 2 as irrelevant under DRE Rule 402 because it is not the final application the Secretary reviewed.
3	Project Washington Developing Delaware Slide Deck dated October 2025 Appellee objected to the admissibility of Exhibit 3 as argumentative under DRE Rule 403. Appellee further objected because the exhibit contains speculative and unsupported financial and other information.
4	DNREC 2024 Annual Title V Fee Committee Status Report
5	Calculating Potential to Emit for Emergency Backup Power Generators, Bay Area Air Quality District, June 3, 2019
6	Calculating Potential To Emit (PTE) for Emergency Generators – September 6, 1995 EPA Memorandum
9	EIA graph, dated January 25, 2024, depicting average annual total of electric power interruptions between 2013-2022 Appellee objected to the admissibility of Exhibit 9 as irrelevant under DRE Rule 402.
10	EIA Table 11.3 – Reliability Metrics Using Any Method of U.S. Distribution by State, 2024 and 2023
20	Photographs of equipment and facilities
21	Generator/Diesel Fuel Enclosure Schematic
23	ecoCube Brochure Letter Appellee objected to the admissibility of Exhibit 23 as irrelevant under DRE Rule 402.
25	Federal Register, Vol. 91, No. 1, Environmental Projection Agency Proposed Revisions of the Nonattainment Designation for the 2008 and 2015 Ozone Standards: Cecil County, MD and New Castle County, DE
27	Curriculum Vitae for Merrit McGlynn

The Board considered the following witness testimony, admitted with the noted objections, and made part of the record:

1. Bradley Gray – Fact Witness

Bradley Gray, principal and managing partner of Worldwide Mission Critical, was sworn and testified as Appellant's first witness. Hearing Tr. Vol. 1 at 50:14-17, March 24, 2026. He holds an aerospace engineering degree from Boston University and has nearly 25 years of experience in data center design, construction, operation, and marketing. *Id.* at 50:18-51:1. He founded Worldwide Mission Critical about seven and a half years ago and has overseen more than 65 data center construction projects. *Id.* at 51:2-10. He is the principal decision-maker for Mission Critical, including aesthetics and site landscaping, while third-party general contractors handled construction with Mission Critical oversight. *Id.* at 51:11-25. Mission Critical was acquired by the Appellant about a year prior and now assists Appellant with development, procurement, design oversight, and construction of data centers. *Id.* at 52:1-10.

Gray explained data centers as warehouse-style buildings housing computer cabinets with IT servers and storage that process and store nearly all forms of digital data, including medical, e-commerce, and government records. *Id.* at 53:3-19. He testified that from the outside, different data center uses, including AI, appear the same with common exterior infrastructure. Hearing Tr. Vol. 1 at 53:20-54:4, March

24, 2026. Data centers support many sectors, including entertainment, e-commerce, government, FAA, EMS, and 9-1-1, and form the backbone of modern electronic information flow touching everyday devices like phones, GPS, fitness trackers, and streaming. *Id.* at 54:5-23. People interact with data centers thousands of times daily. *Id.* at 56:1-3.

He described redundant power systems as essential. *Id.* at 56:9. Utility power feeds uninterruptible power supply (UPS) systems with large battery banks that instantaneously maintain server power for five to ten minutes during outages, allowing on-site generators to start and stabilize in roughly 45 seconds, after which load transfers if needed. *Id.* at 57:1-19. Generators that spin up during brief outages return to standby if load is not transferred. *Id.* at 57:17-19. Cooling uses air-cooled chillers making chilled water that is distributed by air through coils or by liquid via heat exchangers to chip-mounted plates, with closed-loop systems that do not exhaust water and include leak detection cabling. Hearing Tr. Vol. 1 at 57:20-59:9, March 24, 2026.

Turning to the Project, Gray located the campus south and north of specified roads along River Road, with phase delineations. *Id.* at 59:23-60:2. The Project will provide computer processing and storage, operating continuously. *Id.* at 60:3-23. Proximity to Northern Virginia and New York markets, subsea cable landings, fiber lines, and on-site 500 kV transmission made Delaware attractive due to reduced

latency and reliable power. *Id.* at 61:2-19. The site is a large parcel surrounded by existing heavy industry, no wetland disturbance, no endangered species impacts, and is a permitted land use. *Id.* at 61:14-25. The campus consists of 11 data center buildings over two phases, each 500,000 to 700,000 square feet, totaling 579 acres, with five substations, a switching station, and stormwater management. *Id.* at 62:2-19. The switch station connects the 500 kV service, and substations step voltage down for data hall use. Hearing Tr. Vol. 1 at 62:20-63:1, March 24, 2026. Backup includes UPS and generator systems. *Id.* at 63:6-7. Generators run fifteen minutes monthly for maintenance and a four-hour annual test, otherwise only during utility failures. *Id.* at 63:23-64:11.

Gray projected economic impacts: over $10 billion campus investment, $90–$450 million output in the first five years, nearly $3 billion in construction wages, and over $30 million annually in post-construction wages. *Id.* at 64:16-65:16. Construction would involve 3,500–4,000 jobs, with 225+ ongoing operations jobs. *Id.* at 65:17-24. Ongoing salaries are approximately $130,000 for technical roles and $70,000 for ancillary support. *Id.* at 65:25-66:4. He estimated $75 million in tax revenue upon construction completion, with $60 million to New Castle County and $17 million annually to the state general fund, and he stated that data centers generally correlate with lower property taxes and increased services and home values. Hearing Tr. Vol. 1 at 66:5-24, March 24, 2026.

On cross-examination, Gray confirmed familiarity with the coastal zone status application, including a CAT 175-16 engine option for 516 generators and associated 516 belly tanks of 5,020 gallons each, measuring roughly 12 by 39 feet, with generator enclosures and differences between Tier 2 and Tier 4 emissions levels. *Id.* at 67:15-70:6. He acknowledged the Tier 4 configuration shown with exhaust after-treatment (SCR) and external containerized units. *Id.* at 70:7-71:14. He agreed that Appellant's Exhibit 21 shows a top tank view, external 7.5-gallon spill bucket, estimated tank weight around 18,000 pounds, and a two-inch exhaust port for emissions sensing. *Id.* at 71:15-73:7. He distinguished an exhaust stack from an exhaust port and had not reviewed Delaware air regulation definitions. *Id.* at 73:17-74:11. Gray agreed data center components operate as an integrated use supporting continuous operations, and that power outages are intermittent and uncontrollable, potentially requiring generators to run continuously during an extended outage, beyond the 20 hours per year assumed for maintenance and testing. *Id.* at 74:14-77:14.

On redirect examination, Gray affirmed that generators exist because outages are possible but stated the PJM grid is extremely reliable compared to other areas. Hearing Tr. Vol. 1 at 77:19-78:11, March 24, 2026. He is not an exhaust or emissions expert but relies on specialists, and confirmed the Project would use Tier 4 generators, the highest protection level. *Id.* at 78:12-79:3.

2. David Small – Expert & Fact Witness[4]

David Small testified remotely as a senior consultant at Verdantas with approximately nine years at Verdantas and about 40 years of combined public and private environmental experience in Delaware. Hearing Tr. Vol. 2 at 8:12-9:6, 12:9-13, March 24, 2026. He previously served at Appellee from 1987 to 2017, including roles as secretary, deputy secretary, executive assistant, and chief of the Office of Information and Education, and worked in environmental programs with regulatory responsibilities. *Id.* at 10:1-24. He worked closely with Appellee's Coastal Zone staff while in leadership due to the program's multidisciplinary administration in the Secretary's Office and was proffered without objection as an expert in environmental and regulatory policy and permitting programs in Delaware. *Id.* at 11:1-17, 12:20-13:1. Small described the Coastal Zone Act as an early, comprehensive environmental statute that functions as a hybrid of environmental impact assessment and land use, directing Appellee on allowable coastal zone activities, and outlined categories of uses including non-regulated, prohibited such as new bulk product transfer facilities and heavy industry, and allowable by permit. *Id.* at 13:4-14:6. He identified three relevant regulatory exemptions for this case, including warehousing or storage, backup or emergency generators, and equipment

[4] Appellee objected to Mr. Small's testimony relating to outages because he is not an expert on outages. Hearing Tr. at 169:3-5, March 25, 2026.

for transmitting or switching electricity, and explained a status decision as Appellee's tool to determine whether a proposed use is regulated, prohibited, or allowable by permit. *Id.* at 14:13-15:9.

Small led and compiled Appellant's status decision application as authorized agent and coordinated with Appellee. *Id.* at 10:10-18, 16:16-24. He met with Appellee in spring 2025, submitted a draft application in July 2025, and filed subsequent versions on September 8, 2025, and October 30, 2025, after Appellee feedback. Hearing Tr. Vol. 2 at 18:13, 23:4-15, March 24, 2026. Appellee requested emissions modeling at 500 hours per generator in addition to the applicant's 20-hour maintenance and testing scenario based on manufacturer recommendations and also sought water-use clarifications. *Id.* at 20:7-22:19. Appellant supplemented both emissions scenarios and water information, after which Appellee deemed the application administratively complete and noticed it for public comment, and the agency record included exhibits, drafts, submissions, and reviews. *Id.* at 22:4-19, 23:23-24:7. Small stated air permitting is a separate Appellee process to follow only if the status decision allows the project to proceed, and initial air program discussions indicated the coastal zone question should be resolved first. *Id.* at 21:22-24, 24:17-25:13. He noted additional likely approvals include wetlands or subaqueous lands for directional drilling, stormwater and erosion controls delegated to New Castle County, and aboveground storage tank registration, and he addressed

Appellee's jurisdiction over wetlands, subaqueous lands, and erosion and sediment control. *Id.* at 26:19-27:22.

Addressing environmental impacts in the application, Small testified there would be no onsite groundwater withdrawal or wastewater discharge, with water and wastewater handled by utility connections and New Castle County systems. *Id.* at 28:28-29:11. He characterized surface and groundwater impacts as minimal, habitat impacts as minimal on a previously cleared agricultural site, and solid and hazardous waste limited to items like universal waste managed under regulations. Hearing Tr. Vol. 2 at 29:12-30:4, March 24, 2026. He stated generator testing noise would be dominant but comparable to a vacuum cleaner and likely masked by Route 1 and Route 13 traffic, odors would be minimal aside from possible exhaust during operation, and noise and odor considerations include equipment like mufflers and silencers. *Id.* at 30:5-17. He described spill minimization via double-walled steel belly tanks, generators on concrete pads, and Tier 4 units with selective catalytic reduction for air controls. *Id.* at 31:19-32:6. He opined overall environmental impact was generally minimal. *Id.* at 32:7-11.

On generator use, Small testified the application limits operation to emergencies, maintenance, and testing, with registration as emergency generators and no use for peak shaving or ordinary business. *Id.* at 34:4-24. He confirmed diesel fuel use and that emissions for diesel-fired operation were calculated for PM,

SOx, NOx, CO, and VOCs at 20 hours. *Id.* at 35:1-36:2. At 20 hours, the application lists approximately 0.99 tons PM, 0.27 tons SOx, 25 tons NOx, 17 tons CO, and 2 tons VOC annually, and he reviewed Appellee's Title V Committee 2024 report and stated other Delaware sources in various sectors exceed these 20-hour scenario values, though he did not provide a numeric ranking. Hearing Tr. Vol. 2 at 36:8-38:14, March 24, 2026. He described the double-walled belly tanks beneath generators as not interconnected, not used to transport, distribute, or sell fuel offsite, and he did not view these generator-associated tanks as heavy industry or a tank farm given their small size and isolated, non-distribution function. *Id.* at 39:13-40:17. Discussing heavy industry, Small read the statutory list of indicative equipment and examples and noted the Project has no distillation columns, chemical processing equipment, scrubbing towers, pickling equipment, or waste lagoons, and is not an oil refinery, steel plant, pulp mill, or chemical plant. *Id.* at 41:2-43:24. He acknowledged exhaust outlets on generators but emphasized Tier 4 pollution controls and that he is not an exhaust expert, and he identified three applicable exemptions in the regulations, including warehouses and storage excluding tank farms, facilities for transmitting or converting electrical energy, and emergency or standby generators, noting no size or number limits in those exemptions. *Id.* at 42:5-43:2, 44:6-45:20.

On cross-examination, he agreed the CZA prohibits new heavy industry and that "characteristically" in the definition indicates more than 20 acres is not a hard minimum, agreed the campuses total roughly 579 acres and buildings exceed 100 acres, and that the facility is integrated for data and power. *Id.* at 49:19-51:19. He acknowledged that at 500 hours the calculated NOx of 616 tpy would match the application's numbers and did not dispute the Secretary's assertion it would be the second-highest NOx emitter in the coastal zone in that scenario. *Id.* at 56:1-18. He affirmed a Title V permit could be triggered and described Title V as for large sources under the Clean Air Act, but he noted Title V and offsets are not part of status decision criteria. Hearing Tr. Vol. 2 at 54:14-55:4, 67:2-15, March 24, 2026.

On redirect-examination, he reiterated that air regulations' "stack" definitions and Title V are not CZA determinations, that the "onshore facilities" proviso regarding tank farms in the heavy industry definition refers back to the listed onshore support facilities example, and that "sheer size, scale, and intensity" are not criteria in the Act or regulations, confirming his view that the Project is not a tank farm and falls within three CZA exemptions. *Id.* at 69:16-70:17, 71:12-72:21, 74:3-5. He concluded by affirming Appellee's role to protect environmental quality while supporting new industry. *Id.* at 74:10-19.

3. Robert Frey – Expert Witness

Robert Frey is a senior consultant with BFMC LLC, focusing on mission critical systems for manufacturers, end users, government, medical facilities, and similar clients. Hearing Tr. Vol. 2 at 76:1-11, March 24, 2026. He defines mission critical systems as those required for a customer's enterprise to meet its needs. *Id.* at 76:12-16. He has an engineering background and has worked in mission critical power since 1975 across design, implementation, and testing. *Id.* at 76:17-24. For the last 13 years, he worked with a Caterpillar dealer, first as senior applications engineer at Alban Tractor and then as Mission Critical Sales Manager at Carter Machinery after an acquisition. *Id.* at 77:1-9. His experience includes projects for federal facilities, hospitals, state and local government, and companies requiring backup power, and he has prepared redundant power system proposals. *Id.* at 77:10-21. He has consulted on generators, UPS systems, static transfer switches, PDUs, automatic transfer equipment, switchgear, batteries, and exhaust systems, including some projects in Delaware. *Id.* at 78:10-79:2.

Frey understood the Project as being a multi-building modular "white space" data center with multiple halls, likely using a catcher system to provide redundancy when a hall's power equipment is offline. Hearing Tr. Vol. 2 at 80:1-12, March 24, 2026. He believed the Project will be built over eight to ten years and ultimately require about 1.2 gigawatts. *Id.* at 80:16-20. He stated it will connect to a 500 kV

line, which he said is a good decision because higher-voltage transmission is more reliable and less prone to outages than lower-voltage distribution. *Id.* at 81:1-20. He explained that an uninterruptible power supply (UPS) as a double-conversion system that rectifies AC to DC, maintains batteries, inverts back to AC, and provides clean, regulated power with batteries always online to bridge input loss. *Id.* at 82:14-83:14. He described a complete uninterruptible power system as including UPS batteries sized for minutes and generators to sustain power beyond battery duration, configured to achieve N+1 or higher redundancy. *Id.* at 84:3-85:3.

Frey testified that redundancy is built throughout the Project's system, from dual transformers at the 500 kV interconnect through downstream transformers, a switchgear tied to utility and generators, UPS systems, and static switches. *Id.* at 85:4-86:8. He explained that normal power flow included utility into buildings and data halls, through UPS, then to the white space with possible static switches. Hearing Tr. Vol. 2 at 86:9-24, March 24, 2026. He stated UPS will cover short utility disturbances, with switchgear delays around two seconds before signaling generators, which typically synchronize and assume load in about twelve seconds if the outage persists. *Id.* at 88:13-89:9. Shorter, common network-switching outages will not trigger generators, and data centers are powered by the utility about 99.9% of the time. *Id.* at 89:10-90:1. He confirmed that local equipment failures would be

handled by redundancy and UPS batteries without starting generators because an upstream switchgear would not detect such localized issues. *Id.* at 104:19-105:23.

Frey described generator components: a diesel engine as the prime mover, a generator head on the flywheel, an SCR-equipped exhaust system for emissions and muffling, an enclosure with acoustic baffles and radiator airflow, a diesel fuel tank, and a DEF tank for the SCR. *Id.* at 90:2-24. He identified an SCR as selective catalytic reduction to control emissions. *Id.* at 91:1-7. Referring to a depicted enclosure in Appellant's Exhibit 21, he noted radiators, intake and exhaust baffles, an output switchgear, cam locks for annual load bank testing, and a spill bucket to capture overfill during fueling. Hearing Tr. Vol. 2 at 91:9-92:17, March 24, 2026. He believed that C175-16 units are proposed and explained that "Tier 4" refers to emissions performance achieved by adding systems like SCR, here from Safety Power, tuned to meet site-specific requirements including Delaware law. *Id.* at 92:21-95:17. He confirmed the units will be Tier 4, classified as mission critical standby rather than prime power. *Id.* He described the ecoCUBE SCR train: exhaust flows through a Diesel Oxidation Converter, then a Diesel Particular Filter, then urea-based DEF injection in the SCR, which reacts with nitrogen to produce primarily nitrogen, oxygen, and water vapor, with the system also serving as a muffler. *Id.* at 96:1-98:3, 108:16-109:6. He noted 24-inch exhaust piping that may

discharge horizontally or vertically, larger than typical tractor exhausts that also use DEF but are often Tier 3. *Id.* at 98:7-22.

Frey testified each generator has its own double-walled steel belly tank beneath the enclosure, with the interstitial space and sensors to contain and detect leaks, making environmental spills extremely rare. *Id.* at 98:23-99:24. He added that tanks are pressure tested with air for 24 hours before fueling to ensure integrity. Hearing Tr. Vol. 2 at 100:2-11, March 24, 2026. Fuel is delivered by tanker truck and filled via a capped inlet, with trained operators and a spill bucket to capture overfill. *Id.* at 92:11-20, 100:12-24. Tanks are not interconnected to preserve redundancy and avoid cascading failures; each generator has an individual tank. *Id.* at 101:1-10. Tanks are custom designed to fit footprints, and a DEF is segregated within the package, with stated dimensions including both diesel and a DEF. *Id.* at 101:13-102:8. Fuel is consumed onsite by the generators and not transferred offsite. *Id.* at 102:9-15. He stated that integrated fuel tanks on diesel backup generators are common industrial practice and have been standard for at least 50 years. *Id.* at 102:16-24.

Frey stated generators should be run periodically for maintenance, typically 15 minutes monthly with additional quarterly or semiannual load runs, though protocols vary by end user. Hearing Tr. Vol. 2 at 103:1-24, March 24, 2026. He noted the application estimates 20 hours per year for testing and maintenance, which

he considered conservative, and said actual practice is often less. *Id.* at 104:2-12. Only the generator under test runs during maintenance; all units would start in a true utility outage exceeding the switchgear delay, synchronize in parallel, and share load, making 100% loading of all 516 units impossible due to redundancy and typical load levels. *Id.* at 106:1-107:2. He had seen no indication the generators will be used for anything other than loss of utility, including no use for peak shaving or grid export, and stated that additional switchgear would be required to backfeed the grid. *Id.* at 107:3-22. He characterized the system as standby power to support only the facility's loads when utility fails beyond about two seconds. *Id.* at 107:23-108:9.

On cross-examination, Frey confirmed he joined after the application was submitted, and that emissions modeling assumed Tier 4, which he stated is necessary to obtain permits. *Id.* at 112:14-113:11. He estimated the 5,000-gallon tank would support about 20 hours at full load. Hearing Tr. Vol. 2 at 114:1-8, March 24, 2026. He acknowledged his familiarity with the CZA is limited and that his testimony focused on engines and operations. *Id.* at 114:23-115:16. He estimated he had worked on approximately 500 data center projects and cited large deployments such as AWS in Northern Virginia, with about 30 generators per building and extensive regional deployments. *Id.* at 115:17-117:7. He reiterated the Project's 1.2 gigawatt scale and that the system is for emergency backup, with utilities rarely failing. *Id.* at 117:8-118:10. He agreed that the Application's 20-hour figure does not include

utility outage hours, though in practice outage runtime is unpredictable; many data center engines accrue fewer than 50 hours in five years. *Id.* at 118:19-119:21.

On redirect-examination, he clarified that based on experience he initially believed the 20-hour figure included emergencies and still considered 20 hours conservative for this region given grid reliability, contrasting with Florida. Hearing Tr. Vol. 2 at 121:7-122:1, March 24, 2026. He reiterated that Tier 4 is the best available emissions technology. *Id.* at 122:8-13.

4. Jeffrey Hersperger – Expert Witness[5]

Jeffrey Hersperger is a senior operations director at PBF Energy, a mid-level U.S. refiner with six refineries, including one in Delaware. Hearing Tr. Vol. 2 at 123:14-20, March 24, 2026. He holds a bachelor's degree in management from DeSales University and an MBA from Kutztown University, both in Pennsylvania. *Id.* at 123:23-124:2. He has worked in the energy sector since 1977, with over 45 years' experience, including leadership roles at Ocean Point Terminals, Kinder Morgan, Buckeye Pipeline, Gulf Oil, and Chevron. *Id.* at 124:15-21. He has held leadership roles for about 30 years and full P&L responsibility for the past 20 years. *Id.* at 124:22-125:2. His background is entirely in terminals, pipelines, and midstream energy. *Id.* at 125:8-9. He oversees a control center in The Woodlands,

[5] Appellee objected to Mr. Hersperger's testimony because he is not an expert on the CZA. Hearing Tr. at 169:5-9, March 25, 2026.

Texas, and operations in Delaware, New Jersey, California, Mississippi, and Louisiana. *Id.* at 125:12-14. His work involves constructing, inspecting, and operating tank farms. Hearing Tr. Vol. 2 at 125:17-19, March 24, 2026. He has worked in about 30 refineries and within ten of them, with refineries operating 24/7 except during turnarounds. *Id.* at 126:10-16.

Hersperger explained refinery basics, describing distillation columns that boil oil into fractions from heavy oils and asphalt at the bottom to diesel, jet fuel, and gasoline, and light ends like propane and butane at the top. *Id.* at 126:17-127:10. He stated refineries need smokestacks due to heat generation. *Id.* at 127:11-16. He detailed that refineries have crude tank farms for feedstock and separate product tank farms for outputs, with example capacities like 4 million barrels for a 400,000-barrel-per-day refinery. *Id.* at 127:18-128:10. He asserted not all tank farms are refinery-related, citing breakout tank farms along pipelines such as Laurel Pipeline and a Knoxville tank farm. *Id.* at 129:7-21. He defined an industry tank farm as comprising large tanks typically 150–250 feet in diameter and 40–60 feet tall, often 100,000–150,000 barrels, with some as large as 300,000–400,000 barrels. Hearing Tr. Vol. 2 at 130:20-131:2, March 24, 2026. He described components beyond tanks, including fire suppression, cathodic protection, varied roofs, lightning suppression, manifolds, pumps, shell gate valves, mixing and blending capabilities, and complex distribution. *Id.* at 131:3-24. He said “terminal” and “tank farm” are

synonymous. *Id.* at 132:1-4. Tank design varies by product, with different roof types and the lightest products favoring full contact roofs to reduce emissions. *Id.* at 132:9-133:3. Tanks are above-ground carbon steel, built to API 650, maintained to API 653, operated under API 2610, and fully refurbished about every 20 years. *Id.* at 133:6-16, 135:2-10. Tanks are grouped for geographic advantage and diked to contain releases and are interconnected or tied to manifolds for transfers to vessels, trucks, or pipelines with valve operations. *Id.* at 133:19-135:1.

He noted significant oversight of tank farms by OSHA, EPA, and the U.S. Coast Guard for marine facilities. Hearing Tr. Vol. 2 at 135:5-13, March 24, 2026. He disagreed with a Merriam-Webster definition characterizing a tank farm as used exclusively for field storage, stating a tank farm is part of a distribution chain with constant movements, staging, and aggregation. *Id.* at 136:18. He testified the smallest tank farm he is familiar with would be about one million barrels of storage, such as ten 100,000-barrel tanks at a small truck rack terminal. *Id.* at 147:22-148:10. He rejected aggregating many small, separate tanks as constituting a tank farm, explaining non-connected, scattered storage lacks commercial purpose and does not meet industry understanding. *Id.* at 149:1-19.

He understood the Project to be a data center campus with 11 data centers, backup emergency generators, and diesel storage tanks. *Id.* at 137:2-12. He stated there would be 516 tanks at about 5,020 gallons each. *Id.* at 137:13-17. He

compared the 5,000-gallon generator tanks (about 120 barrels) to petroleum tanks that are hundreds or thousands of times larger, with the smallest petroleum tanks being 40–60 feet tall versus the Project tanks about two feet tall. Hearing Tr. Vol. 2 at 137:21-138:7, March 24, 2026. He contrasted construction: refinery tanks are single-wall carbon steel API 650 tanks with multiple welded rings, while the Project tanks resemble double-wall UST-type tanks with interstitial hydrocarbon detection similar to service station tanks. *Id.* at 138:11-139:11. He opined spills are highly unlikely with double-wall tanks and that the Project tanks would store ultra-low sulfur diesel for tier four engines with very low emissions. *Id.* at 139:12-140:5. He concluded that the Project is not a tank farm and not even similar to one, because the diesel is stored solely to be burned on site rather than for commercial movement and sale, and the tanks are not interconnected. *Id.* at 140:6-141:14. He further distinguished oversight and operational practices like foam suppression, monthly inspections, emissions tracking, gauging, and oil accounting as standard for petroleum tank farms but unnecessary for belly tanks with minimal loss risk. *Id.* at 141:18-142:20.

He described refinery smokestacks as 10–30 feet wide at the base and 100–300 feet tall, equipped with wet scrubbers and furnaces to manage emissions and elevate flue gases. *Id.* at 143:3-22. Stacks are under constant thermal load during steady-state 24/7 refinery operations and are subject to continuous emissions

monitoring and boundary monitoring, unlike intermittent generator operation. Hearing Tr. Vol. 2 at 144:1-17, March 24, 2026. He said the Project generator exhausts are a couple of feet wide and about 30 inches tall, comparable to truck exhaust with DEF, mufflers, and catalytic converters, and "certainly not a smokestack." *Id.* at 145:3-14. On cross-examination, he acknowledged Delaware air permit regulations define "stack" without a height requirement. *Id.* at 151:7-18.

On redirect examination, he stated he manages the Delaware truck rack handling propane, diesel, and gasoline daily, with associated tanks operated by the refinery and plumbed into the rack on Wrangle Hill Road. *Id.* at 152:7-14. He affirmed that tank farm characterization depends not just on size but interconnection, and that unconnected tanks are merely storage without commercial purpose. *Id.* at 152:17-24. He confirmed he has not read the Coastal Zone Act and did not link air permit definitions to that statute. *Id.* at 153:11-21.

5. Merrit McGlynn – Expert Witness

Merritt McGlynn is a directing consultant at ALL4 LLC, an environmental consulting firm, with a B.S. in chemical engineering from Penn State University, class of 2002. Hearing Tr. at 176:7-17, March 25, 2026. She has twenty-two years of experience in Clean Air Act permitting, emissions calculations, compliance, and testing, serving power, data center, chemicals, and manufacturing clients. *Id.* at

177:1-178:10. She was proffered without objection as an expert in Clean Air Act permitting related to data centers. *Id.* at 179:1-5.

She testified that the Project would need air permits to operate emergency generators and may need emission offsets depending on permit level. *Id.* at 180:5-16. The Clean Air Act establishes construction and operating permits, potential to emit limits, control technology, and testing, monitoring, recordkeeping, reporting, and public notice requirements implemented by approved state programs including Delaware. *Id.* at 180:19-182:19. The Act includes National Ambient Air Quality Standards for pollutants like NO2 and ozone, and EPA tracks attainment status, which affects permitting stringency. *Id.* at 182:20-185:3. In nonattainment areas, permits can still be issued but trigger lowest achievable emission rate ("LAER") and may require purchasing emission reduction credits. Hearing Tr. at 185:2-20, 186:8-187:2, March 25, 2026.

For emergency backup engines, the LAER-level controls are SCR, diesel oxidation catalyst, and diesel particulate filter, achieving a Tier 4 equivalent emissions level. *Id.* at 188:3-19. She stated these are the best available for this source category and reduce emissions accordingly. *Id.* She explained offsets are banked credits purchased by major sources in nonattainment new source review, often at ratios above one-to-one to reduce overall emissions. *Id.* at 189:1-23.

She described estimating generator emissions using manufacturer data sheets with control technologies, multiplied by hours or fuel to determine potential to emit. *Id.* at 191:6-11. The Project's application used a 20-hour basis for testing, maintenance, and possible emergency operation, which she deemed reasonable given minimal testing needs and high grid reliability. *Id.* at 191:12-192:10. She cited United States Energy Information Administration data showing Delaware has fewer than one outage per customer per year and short durations, indicating high reliability. Hearing Tr. at 193:1-196:20, March 25, 2026. She estimated reasonable emergency operation could be 8 to 12 hours annually, with total around 20 hours, and disagreed with assuming 500 hours per generator per year. *Id.* at 197:3-198:4, 211:9-20.

EPA's 1995 guidance suggests 500 hours as a worst-case basis to calculate potential to emit for emergency generators to evaluate major source applicability, particularly to avoid using 8,760 hours. *Id.* at 198:15-200:17. She noted the guidance does not address equipment malfunction or human error and allows alternative bases considering operating needs and local grid outage data. *Id.* at 201:2-19. She opined the Status Decision improperly applied the guidance by not considering Delaware-specific outage data, which demonstrates minimal frequency and duration of outages. *Id.* at 201:17-202:5. She testified that other regulators use lower bases, such as New Jersey relying on testing and maintenance only, and

several states using 100 hours for PTE. Hearing Tr. at 202:8-204:11, March 25, 2026. She concluded the Status Decision did not address other reasonable bases or the infrequency of extreme outages. *Id.* at 204:12-22.

She discussed Delaware's 2026 Federal Register submission seeking to redesignate New Castle County from the Philadelphia nonattainment area to attainment based on 2021–2024 ozone data generally below 70 ppb, with a 2023 anomaly likely due to Canadian wildfires. *Id.* at 205:8-207:5. EPA has not yet acted, but redesignation would remove nonattainment new source review permitting, LAER, and offset requirements, though Appellee could still enforce to prevent backsliding. *Id.* at 207:6-208:6. She affirmed no document prevents permitting a new source in the county. *Id.* at 208:7-10.

She addressed the Status Decision's suggestion that DOE could order the Project to supply grid power, explaining the facility would need PJM permission, infrastructure, and agreements such as a power purchase agreement, which are not included in the Project plans. *Id.* at 208:11-209:15. She stated the generators will be registered exclusively as emergency units and are not intended for peak shaving. Hearing Tr. at 209:23-210:16, March 25, 2026.

On cross-examination, she confirmed NOx of 25 tons per year at 20 hours would meet the nonattainment major source threshold of 25 tons for the area. *Id.* at 214:8-20. She maintained 20 hours is a reasonable permit basis given manufacturer

needs and grid reliability, acknowledging outages could be longer but historically have not been. *Id.* at 218:3-21. She confirmed some states use 500 hours while others do not, and emphasized guidance differs from regulation. *Id.* at 219:2-18, 223:10-22. She stated emergency emissions would be emitted in the coastal zone when engines run and acknowledged that in a rare federal emergency under DOE 202(c) permit limits could be exceeded and emissions forgiven. *Id.* at 216:17-24, 221:13-222:20. She distinguished Tier 4 versus Tier 4 equivalent engines and, on redirect-examination, testified that she had not observed control technology malfunctions in her experience. *Id.* at 225:1-226:3, 227:11-19. On redirect examination, she reiterated the thresholds and exclusive emergency registration for the generators. *Id.* at 226:15-227:14.

Lastly, the Board considered the following closing argument:

Counsel for the Appellant argued that the Project is a data center campus exempt from CZA regulation and not a heavy industry use. Hearing Tr. at 50:21-51:14, March 26, 2026. Appellant asserted the Secretary improperly focused on size and novelty rather than statutory criteria, which Appellant contends is legal error. *Id.* at 51:21-52:7. Appellant asked the Board to review the Secretary's Status Decision de novo, without deference, and apply the statute and binding Delaware precedent. *Id.* at 52:8-20, 58:1-5.

Appellant presented five witnesses to describe the Project and address alleged heavy-industry characteristics. *Id.* at 52:21-23. Brad Gray testified the Project is a state-of-the-art data center on two parcels along River Road with 11 two-story data halls, a switching station, and substations stepping down a 500 kV line. *Id.* at 52:23-53:10. He stated the Project does three things only: house servers, transfers and distributes power to the data center halls, and maintains backup diesel generators for emergencies. *Id.* at 53:11-15. Former DNREC Secretary Dave Small addressed the application process, minimal environmental impacts, and why the Project falls within express CZA regulatory exemptions. Hearing Tr. at 53:16-22, March 26, 2026. Bobby Frey testified the Tier 4 emergency generators meet Delaware emissions requirements, will be designed and registered as emergency-only, will run less than 20 hours per year for testing and maintenance, and are rarely needed because the utility supplies power 99.9 percent of the time. *Id.* at 53:22-54:11. He added the Project is designed to continue running without backup generation for local equipment failures and that double-walled belly tanks are virtually leak-proof. *Id.* at 54:12-17. Expert Jeff Hersperger testified the diesel belly tanks do not constitute a tank farm, which in industry denotes bulk petroleum storage and transfer installations distributing product to end users. *Id.* at 54:18-55:11. Clean Air Act expert Meritt McGlynn testified Appellee misapplied EPA's 500-hour guidance, actual Delaware outage data average about two hours once a year, the Project is

subject to extensive air permitting, New Castle County is meeting national air quality standards, and the design prevents any grid backfeed from the emergency generators. *Id.* at 55:12-22.

Appellee presented Angela Marconi, who acknowledged EPA's 500-hour guidance is not based on actual data and is misaligned with the CZA's "potential to pollute" standard. *Id.* at 56:7-13. Appellee presented Suzanne Glatz on growing energy needs and PJM efforts, which Appellant argued is irrelevant to a design strictly for emergency use that cannot mechanically backfeed the grid. Hearing Tr. at 56:14-24, March 26, 2026. The Secretary testified the Project does not meet the 20-acre heavy-industry threshold, does not have all or almost all listed heavy industry equipment, did not resemble paradigmatic examples, and he used worst-case EPA guidance without considering Delaware outage data. *Id.* at 57:1-10. Appellant contended these admissions and methods show the Project is not heavy industry and that reliance on size, novelty, and a permitting construct is reversible error. *Id.* at 52:1-20, 57:1-19.

Appellant argued four statutory elements govern heavy industry: a 20-acre footprint of heavy-industry activity, most or almost all of seven listed equipment types, resemblance to paradigmatic examples, and potential to pollute based on malfunction or human error. *Id.* at 58:6-17. On acreage, the Supreme Court's *Sierra Club* decision requires measuring the footprint of heavy-industry activity, not parcel

size, and the Secretary did not identify 20 acres, even using his 17-acre calculation. *Id.* at 58:18-59:16. On equipment, five of seven types—distillation/reaction columns, chemical processing equipment, scrubbing towers, pickling equipment, and waste treatment lagoons—are undisputedly absent. *Id.* at 59:17-60:9. Appellant argued the Secretary improperly redefined "smokestacks" using later-enacted air rules and that generator exhaust outlets with SCR and controls are not characteristic smokestacks. Hearing Tr. at 60:10-61:12, March 26, 2026. Even if exhausts and tanks counted, that is only two of seven, which *Sierra Club* and *Kreshtool* indicate is insufficient. *Id.* at 61:13-64:5. On paradigmatic resemblance, the Project is unlike oil refineries, steel plants, pulp mills, petrochemical complexes, or large incinerators and instead resembles warehouses with data halls, offices, idle backup generators, and electrical substations expressly not regulated under Subsection 5. *Id.* at 64:6-65:15. On potential to pollute, Appellant argued the CZA focuses on malfunction or human error, not hypothetical events, and evidence shows limited run time of 20 hours per year, high grid reliability with about two hours of outages annually, and multiple protective layers including Tier 4 generators, UPS, redundancy, double-walled tanks, and SCR/filters. *Id.* at 65:16-69:22.

Appellant challenged Appellee's theory that 516 individual 5,020-gallon belly tanks create a prohibited tank farm over five acres, noting no statutory or regulatory definition supports that view. *Id.* at 70:1-24. Appellant argued a "collection of

tanks" is not a "tank farm," and reading it so would render statutory terms surplusage. *Id.* The Secretary cited no agency, board, or court decision equating backup generator tanks to a tank farm, while Appellant's experts defined a tank farm as bulk petroleum or LNG storage and transfer complexes with multi-million-gallon tanks, piping, pumps, loading, and distribution functions. Hearing Tr. at 70:22-72:2, March 26, 2026. They contrasted the Project's isolated belly tanks integrated with individual generator skids, with no manifold, interconnecting piping, bulk loading, or distribution chain, and noted separation enhances redundancy and safety. *Id.* at 71:15-72:9. Appellant asserted Appellee's tank-farm theory conflicts with the CZA's text, history, and Appellee's prior practice. *Id.* at 72:10-13.

Appellant argued the Project falls within three express regulatory exemptions: warehouses or other storage facilities excluding tank farms (Subsection 5.1.2), electric transmission, distribution, transformation, switching, and conversion facilities (Subsection 5.1.5), and backup emergency and standby power for emergencies when outside supply fails (Subsection 5.1.8). *Id.* at 72:14-74:1. Appellant said the Secretary admitted the uses appear to fall within these exemptions but improperly read additional requirements into the regulations based on number of generators, treating belly tanks as a tank-farm override, and canceling exemptions due to adjacent generator or tank presence. *Id.* at 74:1-24. Appellant maintained the

regulations provide no scale or tank-count carve-outs and that a valid exemption covers the entire use. *Id.*

Appellant asked the Board to apply the CZA and precedent, reject the tank-farm reinterpretation, find all three exemptions apply, and reverse the Secretary's Status Decision, concluding the Project is not regulated by the CZA. Hearing Tr. at 75:1-76:19, March 26, 2026. Appellant also argued the Secretary's Status Decision violates separation of powers and the Major Questions Doctrine by effectively issuing a regulation without statutory support on a matter reserved to Delaware's General Assembly. *Id.* at 75:21-76:4.

B. Appellee's Case-in-Chief

The Board considered the following exhibits, admitted with the noted objections, and made part of the record:

Appellee Exhibit #	Description
7	Letter dated January 24, 2026 from Michael E. Bryson, Senior Vice President, Operations at PJM Interconnection, LLC to the Honorable Chris Wright, Secretary of Energy and Exhibit A to the Letter Appellant objected to the admissibility of Exhibit 7 as: (1) hearsay under DRE Rule 802; (2) irrelevant under DRE Rules 401-02; and (3) risks confusing the issues under Rule 403. Subject to Appellant's Motion *In Limine* To Exclude Evidence.
8	United States Department of Energy, Order Nos. 202-26-2 and 202-25-4

	Appellant objected to the admissibility of Exhibit 8 as: (1) irrelevant under DRE 401-02; and (2) unfairly prejudicial under DRE 403. Subject to Appellant's Motion *In Limine* To Exclude Evidence.
9	United States Department of Energy, Order Granting Rehearing dated February 4, 2026 Appellant objected to the admissibility of Exhibit 9 as: (1) irrelevant under DRE Rules 401-02; and (2) dated after the Secretary's Order. Subject to Appellant's Motion *In Limine* To Exclude Evidence.
14	EPA Guidance – Memo Calculating Potential to Emit (PTE) for Emergency Generators dated September 6, 1995
15	Delaware Regulation 1134: Emission Banking and Trading Program Emission Reduction Credit Audit
17	C175-16 Generator Set Specifications Appellant objected to the admissibility of Exhibit 17 as irrelevant under DRE Rules 401-02. Appellant further explained that there was no foundation that the generators in the photos are going to be used in the Project.
18	Delaware Emission Banking and Trading Program Webpage
20	Map of Current Philadelphia Nonattainment Area
21	2022 DOE 202(c) Orders Appellant objected to the admissibility of Exhibit 21 as irrelevant under DRE Rules 401-02. Subject to Appellant's Motion *In Limine* To Exclude Evidence.
22	2025 DOE 202(c) Orders Appellant objected to the admissibility of Exhibit 22 as irrelevant under DRE Rules 401-02. Subject to Appellant's Motion *In Limine* To Exclude Evidence.
23	2026 DOE 202(c) Orders

	Appellant objected to the admissibility of Exhibit 23 as irrelevant under DRE Rules 401-02. Subject to Appellant's Motion *In Limine* To Exclude Evidence.
25	Energy Transition in PJM: Resources Retirements, Replacements & Risks (Feb. 24, 2023) Appellant objected to the admissibility of Exhibit 25 as irrelevant under DRE Rules 401-402. Subject to Appellant's Motion *In Limine* To Exclude Evidence.
26	Testimony of Manu Asthana, President and CEO, PJM Interconnection before the US House of Representatives Committee on Energy and Commerce, Subcommittee on Energy (Mar. 24, 2025) Appellant objected to the admissibility of Exhibit 26 as irrelevant under DRE Rules 401-02. Subject to Appellant's Motion *In Limine* To Exclude Evidence.
27	Board Decision Letter on Critical Issue Fast Path – Large Load Additions dated January 16, 2026 from David E. Mills, Interim President & CEO, PJM Interconnection to Stakeholders Appellant objected to the admissibility of Exhibit 27 as irrelevant under DRE Rules 401-02. Subject to Appellant's Motion *In Limine* To Exclude Evidence.
28	2027/2028 Base Residual Auction Reserve Target Shortfall Report (Feb. 9, 2026) Appellant objected to the admissibility of Exhibit 28 as: (1) irrelevant under DRE Rules 401-02; and (2) dated after the Secretary's Order. Subject to Appellant's Motion *In Limine* To Exclude Evidence.
29	PJM – Reliability Backstop Design Working Paper (Feb. 18, 2026)

	Appellant objected to the admissibility of Exhibit 29 as: (1) irrelevant under DRE Rules 401-02; and (2) dated after the Secretary's Order.
30	PJM – Issue Charge: Implementation of Connect and manage Framework for Large Load Interconnections Appellant objected to the admissibility of Exhibit 30 as irrelevant under DRE Rules 401-02. Subject to Appellant's Motion *In Limine* To Exclude Evidence.
32	Status Decisions Appellant objected to the admissibility of Exhibit 32 as no foundation was made as to what was in those or what they were about or concerning. The witness Exhibit 32 was presented to also had not had the opportunity to review them before his testimony. Lastly, they were not originally on Appellee's exhibit list.

The Board considered the following witness testimony, admitted with the noted objections, and made part of the record:

1. Angela Marconi – Expert Witness[6]

Angela Marconi is the Division Director for Air Quality at Appellee, a role she has held since 2021. Hearing Tr. at 229:14-18, March 25, 2026. She has worked at Appellee for about ten years, previously serving as administrator for permitting,

[6] Appellant objected to Ms. Marconi's testimony because she was not disclosed as an expert prior to the Joint Final Pre-Hearing Order. Hearing Tr. at 251:22-252:2, March 25, 2026. Because she was not disclosed as an expert, Appellant also objected to her testimony as being improper opinion testimony by a lay witness because it was based on scientific, technical or other specialized knowledge. Hearing Tr. at 6:1-10, March 26, 2026. Finally, Appellant objected to Ms. Marconi's testimony as outside the scope of her disclosure in the Joint Final Pre-Hearing Order, including testimony regarding tank farms. *Id.* at 6:11-14.

compliance, and enforcement, and as a managing engineer. *Id.* at 229:21-24. She holds a bachelor's degree in environmental engineering and a master's degree in civil engineering, both from the University of Delaware. *Id.* at 230:3-6. She oversees ambient air monitoring, state implementation plans, and permitting, compliance, and enforcement for facilities statewide. *Id.* at 230:8-14. She is a licensed professional engineer, and the person in charge of air permitting reports to her. *Id.* at 251:9-15.

Marconi testified that Delaware's main air quality concerns are ground-level ozone and particulate matter, with exceedances of the National Ambient Air Quality Standard occurring on some days most years. *Id.* at 230:18-24. Ozone forms from reactions of sunlight with NOx and volatile organic compounds. Hearing Tr. at 231:2-6, March 25, 2026. New Castle County is part of the Philadelphia ozone nonattainment area with counties in Maryland, New Jersey, and Pennsylvania. *Id.* at 231:15-18. She stated that New Castle County and Cecil County have requested removal from the larger nonattainment area due to local attainment data, but the 25-ton major source threshold for NOx will remain as an anti-backsliding measure. *Id.* at 232:6-24.

She confirmed the Project proposes 516 diesel generators, some at 3 megawatts, and that diesel generators are higher-emitting sources when operating compared to grid power equipment. *Id.* at 234:10-24. The Project's number of

generators would be far above any other coastal zone source, with the next highest facility having eight. *Id.* at 235:2-11. Each generator would require a construction permit and then an operating permit. *Id.* at 243:1-5. She described the generator setup as including a fuel tank, the generator in a container, pollution control equipment, and an exhaust path. Hearing Tr. at 259:7-11, March 25, 2026. She stated the configuration shown in Appellee's Exhibit 7 includes an SCR and a silencer, and that the exhaust components constitute a smokestack under Delaware air regulations. *Id.* at 243:12-244:8. She testified that stack height would be measured from the ground and that taller stacks improve dispersion due to stack parameters like height, diameter, exit velocity, and temperature. *Id.* at 244:17-245:8.

Marconi identified Appellee's Exhibit 3 as a Tier 4 generator with pollution controls and explained that a Tier 4-equivalent generator might continue to operate if diesel emission fluid is depleted, affecting emissions. *Id.* at 237:7-238:4. On redirect-examination, she reported other states have seen incidents where diesel emission fluid runs out and generators continue to operate as Tier 2, which she characterized as equipment malfunction; failure to shut down as required would be human error. *Id.* at 261:5-262:10.

She testified that Delaware uses EPA guidance recommending 500 hours per year as the starting point for potential-to-emit calculations for emergency generators, applied statewide and not uniquely to this applicant. *Id.* at 236:20-24, 238:9-21.

She considered 20 hours low for testing and maintenance based on typical requirements, noting the Project's 20 hours figure reflects manufacturer recommendations for maintenance and testing only, excluding emergency operation. Hearing Tr. at 238:22-239:9, 247:13-18, March 25, 2026. She explained that Title V major source threshold for NOx in New Castle County is 25 tons per year. *Id.* at 240:4-8. The Project's submitted calculations showed approximately 25 tons NOx at 20 hours and 616 tons at 500 hours of operation. *Id.* at 239:18-240:1. She emphasized potential-to-emit permitting considers maximum credible operation, with 500 hours as the emergency generator starting point, and that potential-to-emit is a limit the facility should never exceed. *Id.* at 240:9-241:4.

Marconi stated that if generators operate in emergencies, many would run simultaneously, creating concentrated NOx in a short time. *Id.* at 241:8-24. She noted that 25 tons could be emitted in under a day if all generators ran for the 20-hour scenario, and all emissions would occur within the coastal zone. *Id.* At 500 hours per year, the Project's 616 tons of NOx would rank as the second-largest emitter in Delaware after the Delaware City Refinery. Hearing Tr. at 245:15-20, March 25, 2026. She contrasted the Project's potential short, intense emission events with refinery operations that generally run continuously throughout the year. *Id.* at 248:6-14. She testified that diesel generation has more emissions than other forms like natural gas, including for NOx. *Id.* at 248:18-249:1.

She explained nonattainment new source review applies to new major sources in nonattainment areas and that Delaware maintains an offset bank tracking shutdowns and reductions that can be used or sold. *Id.* at 246:4-16. Even with offsets, emissions from this Project would occur in the coastal zone. *Id.* at 246:17-22. She highlighted summer as "ozone season," typically May through September, when heat and sunlight increase ozone formation potential, and running generators during such periods would impact the coastal zone. *Id.* at 246:23-247:12.

Marconi acknowledged PJM demand response events and stated a DOE order during Winter Storm Fern in 2026 directed that emissions should not count toward permitting totals. Hearing Tr. at 242:1-14, March 25, 2026. She agreed those emissions, while excluded from calculations, still occur in the environment. *Id.* at 242:15-24.

On cross-examination, she maintained that the exhaust structures are smokestacks based on Delaware air regulation definitions and their function, and opined they are smokestacks under any reading, including the Coastal Zone Act, though she was not aware of a smokestack definition in that statute. *Id.* at 255:8-256:14. She agreed a home chimney and a truck exhaust would be smokestacks under her understanding. *Id.* at 256:22-257:4. She confirmed there is no known statutory limit on the number of generators in the coastal zone, but on redirect-

examination noted the Coastal Zone Act prohibits tank farms and that the Project includes 516 associated 5,000-gallon tanks. *Id.* at 258:11-20, 262:11-17.

She agreed EPA's 500-hour default is an appropriate starting assumption and that the guidance allows alternative estimates based on local outage data, with Appellee starting at 500 and working with applicants to determine appropriate permitting numbers. *Id.* at 253:6-254:2. She did not know what data underlies the 500-hour figure. Hearing Tr. at 254:3-5, March 25, 2026. On cross-examination, she acknowledged that 20 hours could include emergency use in addition to maintenance and testing, referencing prior witness testimony. *Id.* at 252:15-22.

2. Suzanne E. Glatz – Expert Witness[7]

Suzanne Glatz is a registered professional engineer in Pennsylvania, and previously in New Jersey, with a specialty in electrical engineering. Hearing Tr. at 263:19-264:6, March 25, 2026. She is a self-employed consultant advising energy industry clients on PJM regulatory, planning, and interconnection matters across the Northeast. *Id.* at 264:9-16. She worked at PJM from 2011 to 2023, retiring as Director of Strategic Initiatives and Inter-Regional Planning, and previously held leadership roles spanning generation interconnection studies, construction, and

[7] Appellant objected to Ms. Glatz's testimony because: (1) it relied on documents the Secretary did not rely on in the Status Decision and documents dated after the status decision; and (2) it was predicated on general reliability and research forecasts, including documents Appellant objected to. Hearing Tr. at 6:15-22, March 26, 2026.

commissioning. *Id.* at 265:17-266:2. Before PJM, she worked at PPL Electric Utilities from 2000 to 2011 and earlier in consulting on generation, transmission, and distribution projects. *Id.* at 266:3-12. She holds a B.S. in electric power engineering from Rensselaer Polytechnic Institute, an M.S. in electrical engineering from New Jersey Institute of Technology, and an Executive MBA from Temple Fox School of Business. *Id.* at 266:16-21. She chaired PJM's Transmission Expansion Advisory Committee and has extensive experience with transmission/distribution planning and generation interconnection. *Id.* at 267:4-21. She has participated in Federal Energy Regulatory Commission ("FERC") proceedings, including rulemakings and defending PJM in contested matters. Hearing Tr. at 268:5-14, March 25, 2026.

Glatz explained PJM is a regional transmission organization covering all or parts of thirteen states, administering wholesale markets and operating the grid within the Eastern Interconnect. *Id.* at 265:1-13. PJM ensures reliability and just and reasonable rates under FERC oversight, administering energy and capacity markets. *Id.* at 268:15-269:12. The energy market dispatches units daily by reliability and cost, stacking least-cost resources as demand rises and backing down as it falls. *Id.* at 273:4-11. The capacity market is a forward auction, typically three years ahead, procuring firm commitments to meet forecast load plus reserve margin for each June–May delivery year. *Id.* at 270:4-22. PJM models locational

deliverability zones to ensure generation can be delivered into and out of constrained areas. *Id.* at 273:14-274:2. Load varies intra-day and seasonally; PJM dispatches accordingly and plans for outages, maintenance, fuel constraints, and transmission limits, requiring reserves above forecast demand. Hearing Tr. at 271:13-273:11, March 25, 2026.

She testified PJM's last three capacity auctions cleared at roughly double prior average prices, largely due to data center load growth; Pennsylvania filed a FERC complaint that led to temporary price collars, yet auctions still cleared at the cap. *Id.* at 274:3-275:6. PJM projects dramatic load growth, about 30 GW over five years, and a capacity shortfall; the most recent base residual auction for 2027/2028 cleared about 6 GW below target. *Id.* at 275:10-22. PJM's 2023 resource adequacy analysis showed shrinking reserve margins by 2030 and potential shortages even under optimistic new entry scenarios. *Id.* at 278:1-280:20. The 2025 testimony to Congress and PJM's updated 2025 summer peak forecast indicate materially higher load expectations versus 2024 and 2023. *Id.* at 281:5-283:10. PJM reports generation retirements exceeding new interconnections and broader North American Electric Reliability Corporation assessments show elevated or high resource adequacy risks across multiple U.S. regions. *Id.* at 283:16-284:23. PJM identified actions including demand flexibility for large loads and exploring "connect and manage" processes to allow new load customers or generation customers to be more

flexible and curtailment to maintain reliability. Hearing Tr. at 285:6-21, March 25, 2026.

Glatz described DOE emergency authority under the Federal Power Act, allowing PJM to seek orders to run generators during emergencies such as storms, extreme temperatures, or major outages. *Id.* at 295:3-18. PJM requested and received DOE emergency orders during Winter Storm Fern in January, authorizing dispatch of all available generation notwithstanding air quality or permit limits. *Id.* at 295:21-297:5. Similar orders were issued for Winter Storm Elliott in December 2022 due to anticipated cold-related generator unavailability. *Id.* at 298:3-299:13. She noted an uptick in DOE orders, including preemptive actions in 2025–2026 directing PJM to delay retirements. *Id.* at 299:14-301:13. DOE orders allow emergency operation beyond standard hour limits without counting toward non-emergency caps, but do not negate that emissions occur. *Id.* at 302:13-303:15. On cross-examination, she agreed DOE 202(c) orders specify power plants and do not directly compel data center backup generators; many 2026 orders clustered around Winter Storm Fern and were short-term. Hearing Tr. at 332:9-22, 334:23-336:14, March 25, 2026. On redirect-examination, she read DOE Order 202-26-06 as authorizing PJM to direct backup generation at data centers and large customers as a last resort before EEA-3, and she agreed it was referenced in the Status Decision. *Id.* at 337:5-16.

Following the 2027/2028 shortfall, PJM issued a Base Residual Auction shortfall report and is developing a first-ever reliability backstop procurement, potentially in two stages due to limited near-term deliverability. *Id.* at 286:4-289:2, 304:1-20, 309:1-8. PJM initiated a "reliability backstop procurement" workshop paper and multiple stakeholder efforts to improve load forecasting, expedite interconnections, extend price collars, and design connect-and-manage rules enabling curtailment and flexibility for large loads. *Id* at 304:1-306:24, 312:23-314:24. PJM has previously contacted customers with on-site generation to self-supply during constraints and is formalizing processes for curtailment and non-firm service for very large, location-specific retail loads. *Id.* at 305:20-306:24, 314:1-24. She emphasized the unique challenge of integrating dense, large loads where econometric methods are insufficient and utility-provided project timing and ramping data are critical to forecasts. *Id.* at 313:16-314:14.

Glatz reviewed Appellant's application and testified the Project anticipates total demand of 1.2 GW, comparable to a single nuclear unit like Hope Creek or Salem, to be served from the grid with onsite generation as backup. Hearing Tr. at 293:1-16, March 25, 2026. The Application lists 516 emergency generators totaling 504 3 MW and 12 1.5-MW units. *Id.* at 293:19-294:5. She opined the assertion that backup units would run only 20 hours annually is likely unrealistic given PJM's projected shortfalls, and such units may be called more often than for maintenance

and testing. *Id.* at 294:9-24, 309:22-310:13. She explained that while the units could not inject into the PJM wholesale market, operating behind-the-meter reduces grid withdrawals and effectively curtails load during emergencies. *Id.* at 315:15-316:11. She confirmed emissions would occur at the site in the coastal zone when diesel units run, even if emergency hours do not count toward regulatory caps under DOE orders. *Id.* at 310:18-311:7. On cross-examination, she acknowledged the application phases load over 8–10 years, with a large Phase 1 targeted around 2027–2028, and that the generators are proposed, registered, and permitted as emergency-only under Appellee's rules. *Id.* at 323:2-325:2. She was not familiar with Appellee's specific stationary generator rules but did not dispute that emergency generators cannot participate in voluntary demand response under those regulations. Hearing Tr. at 325:3-24, March 25, 2026. She stated outage histories in Delaware were outside her expertise and confirmed the Project does not intend to feed power to the grid or operate preemptively or for peak shaving. *Id.* at 326:17-327:21.

Glatz agreed forecasts contain uncertainty and actual usage could differ project-to-project but emphasized the trend has been accelerating and data centers constitute the vast majority of PJM's recent load growth, corroborated by the market monitor. *Id.* at 318:1-320:1. She explained PJM and utilities are refining forecasts by assigning probabilities, using service agreements, and ramp schedules provided

by customers, with higher confidence for near-term load. *Id.* at 328:2-23. She noted multiple constraints, including transmission build timing and supply chain delays, such as transformer lead times extending from roughly 18 months to three to four years, affecting new generation and infrastructure. *Id.* at 291:1-13, 330:1-11. Finally, she stated the 1.2 GW data center would be a significant addition to Delaware's roughly 2.6 GW load, nearly half when fully developed, and would add materially to regional net load growth. *Id.* at 338:1-17.

3. Gregory Patterson – Fact Witness[8]

Gregory Patterson is the Secretary of DNREC, appointed in January 2025 and confirmed by the state senate. Hearing Tr. at 340:23-341:4, March 25, 2026. He has worked in Delaware state government since 1997 in the governor's office, DNREC, and the attorney general's office, and has dealt with Coastal Zone issues. *Id.* at 341:8-13. As Secretary, he has issued Coastal Zone status decisions and permits, and he read and applied the CZA in this matter. *Id.* at 341:14-20. Patterson testified that the CZA aims to prohibit new heavy industry and regulate manufacturing uses in the sensitive coastal zone. *Id.* at 341:24-342:6. He interprets

[8] Appellant objected to the Secretary's testimony because he was asked on redirect "whether he had anything else to say," which is inappropriate as it called for a narrative response and Appellant was not given an opportunity to recross him on the testimony. Hearing Tr. at 6:23-7:4, March 26, 2026.

7 *Del. C.* § 7001 to identify the coastal zone as particularly sensitive and to prohibit construction of new heavy industry there. *Id.* at 342:13-20.

Patterson explained that a status decision determines whether a proposed new facility in the coastal zone is prohibited heavy industry, a manufacturing use requiring a Coastal Zone permit, or exempt. *Id.* at 343:19-344. Applications are vetted by Appellee's staff for completeness and multidisciplinary input before reaching him for decision. Hearing Tr. at 340:9-345:4, March 25, 2026. He received the final application for the Project in late October and deemed it administratively complete in early December. *Id.* at 345:15-18. He evaluated whether the proposed hyperscale data center with substantial backup generation was heavy industry, a permittable manufacturing use, or exempt, based on characteristics and environmental impact, viewing the facility as a whole. *Id.* at 346:20-347:15. He found the Project would demand 1.2 gigawatts, with standby generation designed to supply the same amount, which equals more than all Delaware residences' load and about seventy percent of statewide current load. *Id.* at 347:8-348:23.

Patterson emphasized the exceptional scale: 516 diesel generators, most rated at 3 MW, each with an attached belly tank of 5,020 gallons measuring about 12 feet by 40 feet and roughly 2 feet high. *Id.* at 346:6-11, 348:4-9, 349:1-12, 351:5-7. He testified there are far more generators than any existing coastal zone facility, where the largest single site has eight. *Id.* at 349:9-12. Appellee found at least 300 permits

mentioning generators statewide, estimating roughly 400–500 such generators in the rest of the state. Hearing Tr. at 349:16-350:4, March 25, 2026. Appellant's application stated expected operation of at least 20 hours per year for testing and maintenance, which he noted did not reflect inclusion of emergency runtime. *Id.* at 350:16-23. He confirmed each generator would have emissions, a stack, and potential to pollute if equipment fails or human error occurs. *Id.* at 351:13-22.

Patterson reviewed the CZA, the CZA Regulations, and the heavy industry definition, focusing on tank farms and smoke stacks as characteristic equipment and the potential to pollute. *Id.* at 354:7-16. He testified that under Subsection 4.9 of the CZA Regulations, a tank farm greater than five acres not associated with manufacturing is prohibited. *Id.* at 355:1-3. He calculated acreage two ways: summing tank dimensions yielded about 5.6 acres if placed adjacently; measuring generator yards from the site plan yielded about 17 acres. *Id.* at 355:7-21. He concluded the Project includes a prohibited tank farm and viewed the integrated facility holistically, noting an overall site of 579 acres and an approximate disturbed/built area around 370 acres. Hearing Tr. at 356:2-20, March 25, 2026. He interpreted "characteristically" in the CZA to mean less than 20 acres can still qualify and emphasized the CZA's Regulations absolute prohibition for tank farms over five acres if not manufacturing. *Id.* at 357:2-8. He defined a tank farm as a significant collection of storage tanks in one location and found 516 tanks meets that

description, despite no explicit statutory definition. *Id.* at 357:20-358:11. He concluded the Project is a prohibited heavy industry tank farm. *Id.* at 358:7-19.

Patterson found the generators' exhaust outlets are smoke stacks, using air program definitions of "smoke" and "stack" to characterize them functionally. *Id.* at 359:12-361:5. He noted the fuel is diesel and that combustion produces smoke as defined. *Id.* at 360:4-11. He testified that mitigation measures do not convert prohibited heavy industry into a permitted use in the coastal zone. Hearing Tr. at 362:13-19, March 25, 2026. He referenced EPA's 500-hour guidance as a starting point for backup generator permitting and considered both the application's 20-hour scenario (25 tons NOx/year) and a 500-hour worst case (616 tons NOx/year), stating the latter would exceed all but the refinery's NOx emissions. *Id.* at 362:20-364:12. He did not believe a 20-hour annual runtime was realistic and expected operations between 20 and 500 hours, leading to major source permitting and potentially around 125 tons at 100 hours. *Id.* at 363:3-365:15.

Patterson acknowledged certain Project components could align with uses not regulated, including power transmission and switching facilities, but he concluded that the presence of a prohibited tank farm meant exemptions could not save the overall integrated Project. *Id.* at 367:1-19, 396:4-24, 402:14-20. He stated the backup/standby power exemption does not apply because the facility is an integrated hyperscale data center whose operation depends on massive, uninterrupted backup

generation, and thus is not "simply backup power." *Id.* at 368:2-11. He also opined the data storage buildings' primary functions may "appear" to align with warehouse/storage exemptions but do not function as warehouses, and the facility also includes a tank farm. *Id.* at 368:16-369:4, 394:23-395:13.

On cross-examination, Patterson agreed the Status Decision did not cite court cases or extensively analyze precedents like *Sierra Club* or *Kreshtool*, and that he did not find the Project had all or almost all characteristic equipment or resembled paradigmatic heavy industries. Hearing Tr. at 375:19-376:20, 378:10-382:24, March 25, 2026. He acknowledged only two of seven listed equipment types—tanks and smoke stacks—were identified. *Id.* at 380:21-24. He conceded the generator yards totaled about 17 acres, not 20, and were non-contiguous, but he emphasized the regulation's five-acre tank farm prohibition. *Id.* at 385:11-24, 387:7-388:3. He confirmed reliance on EPA 500-hour guidance for potential to pollute and did not analyze Delaware outage data or offset impacts on coastal emissions potential. *Id.* at 390:2-392:7. He acknowledged no statutory definition of "tank farm," that he did not apply a dictionary definition of "tank farm," and that his interpretation treating 516 belly tanks as a tank farm is unprecedented, though he viewed it as warranted by the novel scale and aboveground tank registration requirements. *Id.* at 403:1-405:16, 412:3-10. He confirmed the DOE emergency order referenced was a

short-term measure and not a standing requirement for extensive generator use. *Id.* at 421:6-24.

On redirect-examination, Patterson distinguished *Sierra Club* and *Kreshtool* as inapplicable because those matters did not involve a tank farm. Hearing Tr. at 430:6-20, March 25, 2026. He reiterated the application's uniqueness, the integrated nature of the facility, and that 500-plus generators with associated tanks would constitute a major air source in the coastal zone. *Id.* at 430:22-431:11. He affirmed he applied the CZA and the CZA Regulations to find heavy industry based on the tank farm over five acres, smoke stacks, and significant potential to pollute, and stated he interpreted the law liberally to protect the coastal zone. *Id.* at 431:21-432:23.

Lastly, the Board considered the following closing argument:

Appellee argues the Project presents the very risks the CZA was enacted to prevent and is therefore prohibited as heavy industry. Hearing Tr. at 77:9-22, March 26, 2026. Appellee identifies three grounds to affirm the Secretary's Status Decision. *Id.* at 77:22-24. First, the Project is a prohibited tank farm over five acres in the coastal zone. *Id.* at 78:1-5. Second, the Project's overall character shows indicia of heavy industry and a potential to pollute. *Id.* at 78:5-11. Third, Appellant's effort to reframe the Project as unregulated fails. *Id.* at 78:11-13.

Appellee asserts the Project includes 516 diesel storage tanks, each over 5,000 gallons, about 18,000 pounds, collectively covering at least 5.6 acres based on Appellant's measurements. *Id.* at 80:1-8. Appellee argues these tanks are integral, not incidental, to the Project. Hearing Tr. at 80:19-21, March 26, 2026. Appellant's witness Jeffrey Hersperger said refineries would not consider the tanks a "tank farm," but he had not read the CZA. *Id.* at 80:22-81:3. Appellee cites Subsection 4.9 of the CZA Regulations as prohibiting any new tank farm greater than five acres not associated with a manufacturing use. *Id.* at 81:1-82:7. Appellee argues "tank farm" is not limited to refinery-scale tanks and must be read consistent with Section 7001's environmental protection purpose. *Id.* Appellee analogizes to *Coastal Barge*, arguing it would be irrational to allow functionally identical pollution risk based on textual parsing between onshore and other facilities. *Id.* at 83:1-84:21. Appellee maintains the CZA does not define "tank farm," so a common-sense, environmentally protective reading is required. *Id.* at 84:23-85:15. Appellee emphasizes the scale and number of tanks as exactly what the CZA prohibits. Hearing Tr. at 85:16-86:5, March 26, 2026. Appellee adds that accepting Appellant's view leaves no limiting principle on numbers of tanks and generators. *Id.* at 86:6-24. Appellee concludes the CZA and CZA Regulations provide the limiting principle, and the Secretary correctly rejected a narrow definition. *Id.* at 87:1-10.

Appellee urges the Board to consider the full, integrated industrial campus, with buildings and generator yards over 140 acres, system-critical power, extensive fuel storage, emissions equipment, and continuous operations. *Id.* at 87:11-88:1. Appellee argues *Sierra Club* and *Kreshtool* do not impose a rigid multi-factor test; CZA cases are fact-dependent and reviewed for abuse of discretion. *Id.* at 88:9-91:24. Appellee states the Board is not limited to listed elements in the heavy industry definition, and *Sierra Club's* "probably" language does not create a definitive fourth element. *Id.* at 90:1-91:24. Appellee notes the CZA's "some, but not necessarily all," and "such as, but not limited to" language makes the list non-exhaustive and forward-looking. Hearing Tr. at 92:1-94:14, March 26, 2026. Appellee asserts "characteristically" does not require exactly 20 acres, and this use is an integrated campus exceeding 140 acres. *Id.* at 94:15-96:3. Appellee identifies indicia of modern heavy industry, including 516 smokestacks under Delaware air rules, with shorter stacks posing problematic emissions. *Id.* at 96:4-24. Appellee argues 516 diesel generators and associated equipment could not have been foreseen in 1971, but the CZA's flexible terms capture modern heavy industry. *Id.* at 97:1-21. Appellee states manufacturer-required 20 hours of testing yields about 25 tons of NOx per year, a major source in Delaware even after Tier 4-equivalent controls. *Id.* at 97:22-98:19. Appellee presents grid reliability evidence showing 1.2 GW demand comparable to one Salem Nuclear unit, with worsening reliability and

potential DOE orders causing backup generators to run and override permitting, still causing emissions. *Id.* at 98:20-99:24. Appellee emphasizes even a one-day outage could create a major source, and 100 hours would be five times the major-source NOx threshold, all within the coastal zone. Hearing Tr. at 100:1-101:3, March 26, 2026. Appellee concludes the potential to pollute is significant, and other permitting does not alter the CZA classification. *Id.* at 101:4-18. Appellee notes the CZA anticipated new heavy industry through flexible definitions to advance environmental protection. *Id.* at 102:1-18.

Appellee argues Subsection 5.0 of the CZA Regulations requires evaluating the proposed use, not disaggregated components, and the proposal is a hyperscale data center in an integrated industrial campus. *Id.* at 103:1-23. Appellee contends the warehouse exemption does not apply because the facility performs continuous computing, with power demand exceeding all Delaware homes and potential for major impacts upon power loss. *Id.* at 104:3-105:10. Appellee argues the generators are "mission critical," integral to the data center, and far exceed any existing coastal zone site, where the next highest is eight. *Id.* at 105:11-106:6. Appellee warns against using exemptions to evade regulation where the overall use looks and functions like heavy industry. Hearing Tr. at 106:7-16, March 26, 2026.

Appellee cites Section 7005 authorizing the Secretary to develop regulations elaborating the heavy industry definition, binding upon Board adoption after public

hearing, which occurred. *Id.* at 107:1-11. Appellee notes the CZA Regulations resulted from extensive advisory committee work and amendments chaired by former Delaware Supreme Court Justice Holland. *Id.* at 107:12-23. Appellee asserts Delaware courts recognize statutory delegations to Appellee in complex environmental areas, and the regulations are binding on the Project. *Id.* at 107:24-108:6. Appellee concludes the Project includes a prohibited tank farm, functions as a modern heavy industrial complex with indicia and potential to pollute and cannot be recast as unregulated. *Id.* at 108:7-109:5. Appellee asks the Board to affirm the Secretary's Status Decision. *Id.* at 109:6-8.

II. Findings of Fact and Conclusions of Law

On appeal to the Board, the Appellant bears the burden of proof. 29 *Del. C.* § 10125. When making factual determinations, the Board "shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted." 29 *Del. C.* § 10142(d). "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." *Id.*

Delaware courts counsel that "[a]n administrative agency's interpretation of its rules are presumptively correct." *Ramsey v. DNREC*, 1997 WL 358312, at *3 (Del. Super. Mar. 20, 1997) *aff'd* 700 A.2d 736 (Del. 1997). 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." *Id.* Accordingly, a court will not reverse an agency's interpretation of its own rules unless it is clearly wrong. *Id.*

By a vote of 5-0, the Board voted to affirm the Secretary's Status Decision. The following is the Board's rationale:

> MR. DRAPER: Ready. Okay, we are getting ready to move into deliberations, and unlike other board, we do it in public. We are going to sit here and talk amongst ourselves and to each other and then hopefully after some discussion we will go ahead and vote. Mary, you want to start.
>
> MS. DOUGLAS: Sure. Yea, I thought it might be useful to put forward a few thoughts as a framework before we plunge into back and forth, and really, I think the thing we need to keep in mind, I intend to keep in mind, is the purpose of the Coastal Zone Act. And I can see it has a couple of purposes, but it has a primary purpose. And the primary purpose is to [protect] the natural beauty of the coast area. I know the secondary purpose is involved encouraging appropriate business within the Act. So that we have to kind of keep in mind. I know Delaware has plenty of business interest.
>
> But the primary purpose of this Act is to protect the coast. I just wanted to say a words about ambiguity. You know, as I read the statute, there are some terms that are ambiguous. We might agree on that, at least one of them is a little fuzzy, tank farm. And that has certainly been the subject of a lot of discussion. But the Delaware Supreme Court in Coastal Barge does say that when courts must interpret ambiguous language[,] [t]he fundamental rule is to give effect[] [to] the intention of the legislature. And that case was specifically about the Coastal Zone Act.
>
> So now I know the appellant is saying the statute is perfectly clear. It's not ambiguous and you don't even have to get to that point. But I would disagree.

So a couple of thought there. I don't want to monopolize anything, kind of overarching themes of almost all judges, in my experience, are ambiguous. If they weren't ambiguous, we all wouldn't be here for several days they would be crystal clear what their responsibilities were. But here we are, and plenty of courts use dictionaries. They use different ways to define things. They use their common sense if there really isn't an appropriate definition within the [regulations or] statutes. Just some thoughts here. I will shut up.

MR. DRAPER: One of the things that I have thought about is we were contemplating the definition of tank farm, and definition of the smokestacks, does this group want to set a precedent and accept the definitions we have been given. don't know that we want to do that.

MS. DOUGLAS: That's interesting. Why wouldn't you want to?

MR. DRAPER: Because you took two things smoke and stack, and put them together.

MS. DOUGLAS: Gosh, that is interesting. I have to admit, it doesn't trouble troubled me in slightest. It seems sensible to me a smokestsack under those terms is some emissions that are unburnt and some gases that go out of a certain shaped stack and what about others.

MR. SCOTT: Interesting thought. There were a couple of discussions I think that were centered on [definitions], maybe a way to think about it, discussion around tank farm and discussion around smokestacks. Again, going back, I think to your earlier commentary, we look back to the intent of the statute. The statute is to protect coastal Delaware. So irrespective, no what matter what you call a collection of tanks in a defined space and area that hold two and a half million gallons of [diesel fuel], is that the right thing to have in the coastal zone. That is a fundamental question.

I think, likewise, looking at stacks, pipes, emissions whatever they are called[] [b]ut at that point in time they are emission points. And they are actually [emitting] when running [for testing and maintenance alone] enough NOX to constitute themselves as a [major source]. So it's almost kind of irrelevant in my mind as to whether or not it's a smokestack or smoke pipe or smoke vessel, whatever you want to call

it. Again, it's a distinction without a difference in my mind as it relates to the protection of the coastline.

MR. SNOWDEN: I would like to – I did this calculation last night. I know one of the public comments was sort of on the same line. What I did was I looked at – [Appellant's expert] offered that the smokestack[s] [are tens of] feet in diameter. But usually what you see your visions in your mind of a smokestack for a factory or industrial use. But here you have 516 exhaust pipes. If you take just the surface area of that exhaust pipe, and take the benefit of the doubt and use the smallest diameter, which is 25 inches, and you take the surface area, 25-inch diameter. You multiply it by 516. What is the comparable diameter of the stack that would accommodate[,] not counting fluid mechanic[s], loss[es] of all other kinds of things. Just say the aggregate you put all those exhaust pipes in one stack, my calculations show a diameter 47.3 feet. That is a big stack.

I think kind of looking in that context, the notion of taking exhaust emissions and moving them up, I think that, in my mind, that satisfies smokestack.

MS. DOUGLAS: That is impressive. I also think that tall stacks evolved in order to keep emissions away from people down below. And these short stacks are going to be, intuitively they are going to be various pollutants, particularly NOX, organic compounds, particles that are extremely dangerous for human health, are going to be spreading them more efficiently to neighbors down below.

MR. BELL: I think when you break it apart, it has in there in terms of you looking at subsection by subsection, going back to Mary's point, the primary purposes of the Coastal Zone Act, you know, doesn't allow you to pick lot of these things apart. I think I heard – forgive me, I don't know the exact terminology – in order to do a status decision that's when you have a novel industry. That is the case we have here. Although this some merit to picking it apart, there is not enough merit to say that a status decision wasn't needed because as it was explained to use, the project that has never been done before, has never even applied before. So you would have to do some of these things that are a little unorthodox or creating an emerging definition that makes it make sense as a whole.

MS. DOUGLAS: I like that, and I also think the statute itself is really helpful in terms of providing flexibility[,] [such as] ["]characteristically["] [means] in my mind ["]usually, but not always.["] So it gives some flexibility for future uses that weren't contemplated, like what we are talking about now. Also ["]including, but not limited to.["] That's something that gives tremendous leeway in interpretation. So there are some difficult cases. I don't know if we want to get into that. I think the Sierra Club case is, I've got to say, I think that it was decided because there was a tremendous environmental benefit to not having everyone have to have septic systems in that particular area, and having them replaced by new wastewater treatment system that also didn't have wastewater lagoons, which the court emphasized. And I think the court was deferring, as we heard this morning, was deferring to the Superior Court and the Board and the Secretary.

So those things taken together, to me, distinguish it from a very rigid application of numbers of alignment with the interpretation or – I mean, the definition.

MR. SNOWDEN: I would also like to add in terms of the tank farm definition. If looking right at the statute, 702, the last sentence, long sentence there talks it about definitions of things that aren't heavy industry. It goes through a long list. But it fits through, you know, factories and so forth. Then it sort of – that phrase kind of finishes up onshore facilities, then it goes into the less than size and warehouses, et cetera. It goes through a bunch of things, then it comes to a semicolon, and the last phrase is "provided, however, that onshore facilities should not include tank farms or storage tanks."

To me that "or storage tanks" give us a little bit more insight into, you know, legislative intent there. It is not a tank strict, you know, refinery tank farm. So and includes storage tanks. I think really opens up the definition broader.

MR. DRAPER: A couple things that I would have liked to have seen was who is going to operate this data center. And what kind of experience do they have. And when the expert told us that at the auction

in December, the grid was six gigs short. We are getting ready to add 1.2 more gigs to it.

MS. DOUGLAS: That was remarkable testimony. Yea, I've got to say, I think it was pretty common knowledge in Delaware that PJM didn't meet its goals for December for the forward capacity market. But to have an expert put it in those terms and to know the emergency generators system might be ordered to actually use their emergency capacity without even counting emissions towards permit purposes with no impunity. It was chilling.

MR. DRAPER: One thing she didn't say was is it bid more, get more or is it that's all the availability we got. Do we need new power plants.

MR. SNOWDEN: I think that was kind of read into it when she talked about the request to keep certain generators or power plants online longer than what was requested to [dec]ommission. looked at that and what that really goes to is that 25 versus 500. I think what we can see there from – that is the bid and they live and die on what they forecast. You know, like anything, it is a risk, but calculated risk when you have in depth forecasts. And that forward looking projection, versus looking back 2022, there was a certain [graph] [t]hat was shown about excess capacity. And it was, like, in 2022, the gap was the largest and as time went forward, it crossed. I think that's – they were – we can look at that forecasting and a reliable projection for the future rather than looking at past performance. As we know, things change.

MR. SCOTT: I would like to revisit [the topic of] ambiguity that was brought up earlier. Specifically as it relates to case law that was an example, Kreshtool and the Sierra case. I think the thing that keeps sticking in mind is the words they use there that [the] court interpreted differently than what I might have, as I see them written in the statutes. So [a] word[] like some, okay, was [considered to be] vague [in] the Court's rul[ing of] how to interpret the word[] some. I think in our [work] we have to interpret the statute as it is written. And I see those words and comprehend those words literally. So to me it means some indefinite volume or amount of [a] whole. It's not definitive, it's not descriptive. The statute doesn't say most of, or all of, or majority of. It says some of. That is, to my mind, says that, okay, that can be anywhere from one to whatever. Not the majority of some significant number of.

So I think we have to think about how we [consider] the flexibility that's in the statute but also think about [] ambiguity in terms of some [] things not [being] ambiguous [at all]. I [read] the case law, I read it nine times, so I think I understand it. But again, the statute is written as it is. We didn't come back and change the statute after that case. So when I read the statute, I have to read it and interpret it literally as written.

Some to me means one thing. It doesn't mean most. So again, I think we need to consider how we apply learning[s] from that particular ruling to this particular case.

MR. SNOWDEN: We have to bear in mind that it includes words like characteristically and including but not limited to. So it is broad. Somewhere it says it should be construed liberally. I think that I gives us the room there to do so.

MR. DRAPER: Anybody have anything else they want to add?

MR. SNOWDEN: I want to mention warehouses because I think the [Appellant presented the buildings as warehouses.] [Y]ou see a lot of these Amazon warehouses, stick something in there, and keep it warm, keep it cool in the summertime. That's it. But it just doesn't – in my mind doesn't fit because you have the facility here, that is projected to consume 1.2 gigawatts of power. They have 11 warehouses, that's more than .1 gigawatts or one tenth of homes in Delaware consumed by each of those warehouses. If they are using that much power, one tenth of a nuclear reactor across the river there is something going on there. There is a lot going on. So it is consuming that power to do something, whether it's a baseline level to store data but it is manipulating data and transmitting. There's a tremendous amount of activity going on there electronically. So much so that a byproduct of all this is a lot of heat. They have to have [a cooling] system.

That wasn't part of this decision. That is part of the integrated facility generates a tremendous amount of heat because you are using a phenomenal amount of electricity. That is an indicia of something heavy going on, because 1.2 gigawatts of power being consumed.

MS. DOUGLAS: I really like that point. Yeah, sometimes when we heard about warehouses, it was sort of sounded so anodyne like a climate controlled warehouse. But it's so much more than that. I mean, it has elaborate and absolutely essential system of cooling. And if anything goes wrong with the power, clearly data centers is an example, experience horrible things and have gone out for days. So the point that it is integrated, we shouldn't be parsing out parts of it to measure acreage I think is absolutely a fair point.

It coexists, generator systems, the elaborate cooling systems, the fans. We didn't talk about fans actually, but so, perhaps, that is out – maybe we did. Did they?

MR. DRAPER: They were mentioned.

MS. DOUGLAS: They were mentioned. Anyway, the systems are complex and they have to be maintained meticulously or everything crashes. Thousands of servers and so yea, it's definitely more than a warehouse and it hasn't been – we are all talking about words, something out of Alice in Wonderland, what is a warehouse? What is a tank farm? Fair question. Will the courts gradually define those so-called warehouses or data halls differently or data centers differently, probably. There will be a lot of infills eventually to kind figure out exactly what they are.

MR. DRAPER: Well, I think it would be fair to say that there hasn't been much legislature written about a hyper data center.

MR. SNOWDEN: It's indicative of the novelty of them. So.

MS. DOUGLAS: It is true they are brand new. Actually, maybe that is not entirely fair but they have evolved in a really steep curve in the last few years.

MR. SNOWDEN: Another point too about the warehouse. The experts testified that in terms of backup, this is required for a white space. That white space is not a warehouse for your cartons of toilet paper.

MR. DRAPER: Anything else? We ready to vote?

MS. DOUGLAS: Do we want to talk about potential to pollute more?

MR. SNOWDEN: That goes to the projections PJM projections and because pollution really comes from the emissions when the generator is going to be used. Going took more than 20 hours a year, that increase – it's already kind of the testing requires that major source, going from the 20 to 500, that just increases the potential to pollute.

MR. SCOTT: [Appellant's point] is [the] use of the EPA standard of 500 hours is inappropriate for this particular project, [and] not just – but from other side of that I believe [] that is consistent with the approach that the secretary used when evaluating permitting in this case, or [a] case [for] four generators. So it is consistent methodology. I think what I heard was this kind of [an opening] position. So if 500 hundred hours is too many hours then let's talk about how to mitigate it down, possibly adjust the hours of [operation]. So I don't know that [this] was [an] unusual process or unique process. [The decision on] Project Washington's generators seemed [consistent] with methodology they used historically.

MS. DOUGLAS: Yes, I agree with what you said. I did want to mention that even though EPA's position to change the status of the part of existing [nonattainment] area, [nonattainment] means primary health standards haven't [been attained] and it just to sort of unleash NOX emissions kind of an unknown quantity given, as we say, the needs of the grid and undefined episodes of extreme climate that could occur, it would really be staggering potential to harm nearby communities because NOX does mix with sunlight and VOCs and ground level ozone could really increase and vulnerable population; the young, the old, young kids with asthma, old people with COPD, they would suffer. So I think the point was made that 616 tons a year at the 500 level, that probably wouldn't be reached, but something maybe half of that I think someone testified half of that could happen.

Project Washington would, at the very highest level, it would be second highest NOX emitted in the state after the refinery.

MR. DRAPER: Even at the lowest level it was a major source.

MR. SNOWDEN: While given that all that is true, we have to go back to base here and remember that within the coastal zone. It's a heighte[ne]d scrutiny at that level of environmental protection, and go across the road you thing are a little different, east of there, that is what the statute is all about, protect that special area. So that is special consideration.

…

MR. DRAPER: I will entertain that motion.

…

MR. SNOWDEN: Right.

MR. DRAPER: Second.

MS. DOUGLAS: Second.

MR. SNOWDEN: Motion to affirm.

MR. DRAPER: Motion to affirm.

MR. SNOWDEN: You are making –

MR. PICOLLELLI: To affirm. Who seconded?

MR. DRAPER: Mary.

…

MR. DRAPER: We are going to do a roll call. CJ.

MR. BELL: Affirm.

MR. DRAPER: Robert?

MR. SNOWDEN: Aye.

MR. DRAPER: Affirm?

MR. SNOWDEN: Affirm.

MR. DRAPER: Mary?

MS. DOUGLAS: I affirm.

MR. DRAPER: Willie?

MR. SCOTT: Affirm.

MR. DRAPER: I affirm. The Board is unanimous. We uphold the Secretary's findings.

Hearing Tr. at 109:12-127:10, March 26, 2026.

The Secretary's Status Decision is **AFFIRMED**.

IT IS SO ORDERED, this 17th day of April 2026.

/s/ *Jeffrey Draper* Dated: 4/17/26
Jeffrey Draper, Appointed Board Member and Acting Chair

/s/ *Mary Douglas* Dated: 4/17/26
Mary Douglas, Appointed Board Member

/s/ *Willie V. Scott* Dated: 4/17/26
Willie V. Scott, Appointed Board Member

/s/ *CJ Bell* Dated: 4/17/26
CJ Bell, Ex-Officio Member
Division of Small Business and Tourism

/s/ *Robert Snowden* Dated: 4/17/26
Robert Snowden, Ex-Officio Member
New Castle County Planning Board