

BEFORE THE ENVIRONMENTAL APPEALS

BOARD OF THE STATE OF DELAWARE

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IN RE: APPEAL NO. 2024-04

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BEFORE: DEAN HOLDEN, Chair

MICHAEL HORSEY, Member

RANDALL HORNE, Member

DEBORAH WICKS, Member

ROBERT MULROONEY, Member

HEARING: Tuesday, October 22, 2024

9:00 a.m.

LOCATION: Richardson and Robbins Building

89 Kings Highway

Dover, DE 19901

WITNESSES: None offered

Reporter: Maia Storlazzi

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A P P E A R A N C E S

SAWYER M. TRAVER, ESQUIRE
Deputy Attorney General
Delaware Department of Justice
820 North French Street
Wilmington, DE 19801
Counsel for DNREC

EDWARD E. BINTZ, PRO SE

ALSO PRESENT:

ZACHARY A. NAYLOR, ESQUIRE

JANELLA SAPP

KELLY KOLLIAS

BRUAN GILLILAND

SAMANTHA COMPONOVO

BRANDON HOLSTON

GRACE BEST

KATHRYN LIENHARD

LISA BORION OGDEN

JEN PAWLOSKI

J. REICH

LESLIE REESE

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Number	Description	Offered	Admitted
NONE OFFERED			

P R O C E E D I N G S

CHAIR:

Good morning. My name is Dean Holden, Chairperson of the Delaware Board of Environmental Appeals. Before we begin, for those of you attending in person, please silent your electronic devices. For those joining on the phone or online, please mute your microphone unless you are addressed by the Board or it's your turn to speak.

The purpose of today's hearing is for the Delaware Board of Environmental Appeals to consider DNREC's Motion to Dismiss Appeal 2024-04. That appeal was filed by Mr. Edward Bintz. The appeal challenges two federal consistency certifications issued by DNREC to the US Army Corps of Engineers in conjunction with the project and development of US Wind to create an offshore wind farm for power generation.

Notice of today's hearing in the auditorium at DNREC's offices at 89 Kings Highway, Dover, Delaware, and by virtual access, was posted on the State of Delaware Secretary of State's public meeting calendar and on the Board's website. In addition, public notice of this hearing was published

1 in the News Journal and the Delaware State News.

2 The Delaware Board of Environmental
3 Appeals is a quasi-judicial body created by the
4 General Assembly to hear appeals of decisions of the
5 Secretary of DNREC. The way the Board fulfills its
6 duties and responsibilities, including conducting
7 hearings, is established and governed by Delaware
8 Code, the Board's regulations, and case law.

9 I will now introduce the Board members
10 and Board staff. To my left, Mr. Mike Horsey, Ms.
11 Deborah Wicks, and Mr. Robert Mulrooney. And to my
12 right, Mr. Zach Naylor, our Board's AG. We also have
13 with us today, I'm sorry, Ms. Janella Sapp as the
14 Board's administrative assistant. The Appellant is
15 representing himself.

16 And Mr. Bintz, if you would go ahead
17 and introduce yourself, please.

18 MR. BINTZ:

19 Yeah, sure. Ed Bintz, the Appellant.

20 CHAIR:

21 Thank you, sir. The Appellee is
22 represented by Counsel today. Counsel, would you
23 introduce yourself, please?

24 ATTORNEY TRAVER:

25 Yes. My name is Sawyer Traver, the

1 Deputy Attorney General representing DNREC.

2 CHAIR:

3 Thank you very much. All right.

4 So DNREC, today DNREC will have up to
5 30 minutes to argue in favor of its Motion to Dismiss
6 and may reserve any portion of that allotted time for
7 rebuttal. That will be followed by 30 minutes --- 30
8 minutes for Mr. Bintz to argue against the Motion to
9 Dismiss.

10 Board members may ask questions during
11 argument or after the allotted time. The Board may
12 deliberate after the argument have concluded.

13 Counsel for DNREC, you may now proceed.

14 ATTORNEY TRAVER:

15 I'd like to reserve ten minutes,
16 please.

17 So, good morning. As I said, my name
18 is Sawyer Traver. I'm here representing DNREC on its
19 Motion to Dismiss the foregoing appeal. This appeal
20 was brought challenging DNREC's federal consistency
21 review of two applications for federal permits made
22 by US Wind related to an offshore wind project.
23 However, simply put, the EAB cannot hear this appeal
24 because the federal regulations governing federal
25 constituency review evince the limited nature of a

1 state agency's review and preempt the jurisdiction of
2 this Board.

3 Further, this appeal is outside of the
4 EAB's 7 Delaware Code Chapter 60 jurisdiction.
5 Accordingly, DNREC seeks to dismiss this appeal as
6 the EAB lacks jurisdiction and the ability to redress
7 the federal consistency review at issue. So -.

8 MR. BINTZ:

9 Excuse me, I'm sorry to interrupt, but
10 I'm having a hard time hearing. The microphone is
11 breaking up a little bit.

12 CHAIR:

13 One moment. We're moving cameras and
14 mics around.

15 ATTORNEY TRAVER:

16 Is that better?

17 MR. BINTZ:

18 Yeah, much better. I appreciate it.
19 Thanks.

20 ATTORNEY TRAVER:

21 So, the coastal zone management
22 regulations, the CZMA, I will try to avoid acronyms,
23 but it's a little difficult here. The CZMA
24 regulations preempt the EAB's review of this appeal.
25 No one promulgates those federal regulations that

1 govern DNREC's federal consistency review of the US
2 Wind applications. Pursuant to these regulations,
3 DNREC's federal consistency review gave DNREC the
4 opportunity to concur, conditionally concur, or
5 object as to whether US Wind's federal permit
6 applications comply with state enforceable policies.
7 And an enforceable policy is any state law that NOAA
8 has deemed compliant with the requirements of 15 CFR
9 Section 923.84(b).

10 The regulations impose a strict six
11 month time limit to DNREC's review of the federal
12 applications. It's a hard limit that can only be
13 extended by mutually a sentence stay. Once that
14 clock runs, the State has no further input.
15 Concurrence will be presumed if the State does not
16 render a decision within that timeframe. State's
17 answer cannot be amended after six months.

18 Here, the clock ran on July 9th. For
19 the BOEM federal permit, the application was received
20 June 23rd, stayed on July 23rd, unstayed February
21 9th, and the decision was issued July 9th. So that's
22 one month plus five months. For the Army Corps, same
23 thing. It was received October 11th, stayed November
24 11, February 9th through July 9th. So that was the
25 period of review.

1 Importantly, DNREC's federal
2 consistency review is not an approval or a denial of
3 a state or federal permit, nor is it a final decision
4 of DNREC. Only BOEM or the Army Corps --- and/or the
5 Army Corps can approve or deny US Wind's
6 applications.

7 South Carolina's Administrative Law
8 Court, addressing a similar challenge to a state
9 agency's conditional concurrence issued in a federal
10 consistency review of an entity's application for a
11 federal permit, summarized it aptly. Because a
12 conditional concurrence has been issued, because
13 there is no procedure allowing a state to withdraw or
14 replace the conditional concurrence issued in this
15 case, because NOAA and BOEM consider the state's role
16 in the permitting process to be completed at this
17 point, i.e. the federal government has preempted the
18 state agency's involvement beyond the point of
19 issuing a concurrence, and because it would lead to
20 absurd results under the federal statutory and
21 regulatory framework for the Administrative Law Court
22 to review the federal permitting consistency
23 determination at issue, the court concludes that any
24 opinion it might render would not have any effect in
25 addressing Petitioner's injury and that the issue is

1 thus moot. And that is the Billy Keyserling case
2 that I cited in my brief, my reply brief, 2016
3 Westlaw 162-7206 FH5.

4 Here, too, DNREC's authority under the
5 federal consistency review regulations has ended with
6 the conclusion of the six month review period, and
7 DNREC's further involvement is preempted by the same
8 regulations. Therefore, the EAB has no ability to
9 address the injuries alleged in this appeal.

10 Next, Appellant cites 7 Delaware Code
11 Section 6008 as grounds for the EAB's jurisdiction in
12 this case. However, this is unavailing for two
13 reasons. First, the CMP regulations, that is DNREC's
14 policy for its federal consistency review, are not
15 promulgated under Chapter 60, but rather find their
16 source of statutory authority in the federal CZMA.
17 The CZMA requires the promulgation of the CMP
18 regulations. As part of the State's coastal
19 management program, the State must submit the
20 procedures it will use to implement the federal
21 consistency requirements of the CZMA. That's 15 CFR
22 Section 923.52(a).

23 The CMP regulations cannot be altered
24 absent federal approval through NOAA. Accordingly,
25 DNREC has no independent statutory authority over the

1 CMP regulations. Because the CMP regulations do not
2 arise out of 7 DELC Chapter 60, the EAB has no
3 jurisdiction to hear appeals regarding the CMP
4 regulations.

5 And second, Delaware Code Section 6008
6 grants the EAB the authority to hear an appeal of a
7 decision of the secretary. But the conditional
8 concurrence is not a final decision of the secretary,
9 but one preliminary part of the federal agency's
10 review in issuing federal licenses and permits. It's
11 just one step in the federal permitting process.
12 When BOEM and the Army Corps rendered decisions on
13 those applications, there will be a final decision
14 ripe for appeal in federal court.

15 In sum, this appeal of DNREC's
16 conditional concurrence to US Wind's federal permit
17 applications is improperly for the EAB. The EAB's
18 jurisdiction is federally preempted by the CZMA,
19 which explicitly limits State review of federal
20 permit applications to a six month period after which
21 the State's concurrence is presumed. Until the
22 federal agencies issue a final decision on US Wind's
23 application, there is no right of appeal. Thus,
24 DNREC respectfully requests that the EAB dismiss this
25 appeal.

1 CHAIR:

2 Questions from the Board?

3 MR. HORNE:

4 None here.

5 MR. HORSEY:

6 None.

7 MR. MULROONEY:

8 I guess one, I do have one question.

9 So if the Board were to hear this appeal and find in
10 favor of the Appellant, what happens to the permit at
11 that point?

12 ATTORNEY TRAVER:

13 That is a good question, and that is
14 the absurd result the case was referring to that I
15 cited. So, if you were to find for Appellant after
16 that six month time period, it would effectively
17 nullify --- well, in theory, it could nullify the
18 conditional concurrence that DNREC issued. But the
19 federal government already considers that concurrence
20 final because it was issued at the end of the six
21 month period, there's no time left. They're already
22 proceeding through review, and I think they have a
23 time limit of their own for issuing their decisions.

24 So it would us into a no man's land.

25 If it nullified DNREC's conditional concurrence, then

1 it would be as if we hadn't issued any response and
2 federal government could presume our concurrence
3 anyway.

4 MR. MULROONEY:

5 Thank you.

6 CHAIR:

7 Any other questions from the Board?

8 All right.

9 Mr. Bintz, the floor is yours.

10 MR. BINTZ:

11 Sure. Just a couple of comments just
12 on the sort of the overall structure of the Coastal
13 Zone Management Act and how it kind of interacts with
14 the Delaware coastal management plan. The way I look
15 at it is the federal --- the CZMA sort of establishes
16 a framework for states to adopt their own coastal
17 management plans. And so, the states will off and do
18 that and develop their plans, but they're very much,
19 you know, sort of structured and designed by the
20 States, and then they come back to the federal
21 government to have it sort of blessed or approved
22 that it meets the sort of the overall framework that
23 the government has --- has established through the
24 CZMA.

25 So last night, I was just looking

1 through a NOAA publication that's called, you know,
2 Coastal Zone Management Act Overview. And it says,
3 and I'll read here just two sentences. The CZMA
4 provides the flexibility states need to design
5 programs that best address local challenges and work
6 within state and local laws and regulations. This
7 approach means state programs can be set up in a
8 variety of ways as long as the CZMA requirements are
9 met.

10 So, it's very much a Delaware program.
11 It just has to meet state --- state requirements,
12 excuse me, federal requirements. And you know, the
13 Delaware program's going to be different than the
14 Maryland program. It's going to be different from
15 the New Jersey program.

16 So, to get started here, I'm going to
17 first discuss why the Board has jurisdiction over my
18 appeal and why it isn't preempted. I'll then talk
19 about why it's covered by Section 6108. And mixed in
20 with that, I'll also cover this question of finality,
21 or the issue not being right because it's not a, it's
22 asserted that it's not a final DNREC decision.

23 So to start, I'm not sure if
24 everybody's had a chance to read all the briefs, but
25 in the brief I filed on October 7th, you know, I

1 discussed the CZMA statute and its legislative
2 history and, you know, and that they support the
3 Board's appeal jurisdiction. The statutory findings
4 of the CMA state in one of the sections, you know,
5 the key to protecting coastal resources is to
6 encourage the States to exercise their full authority
7 over lands and waters in the coastal zone. And then
8 the legislative history says there's --- there's no
9 attempt to diminish state authority through federal
10 preemption. The intent is for states to assume
11 planning and regulatory powers over their coastal
12 zones. So there's really no indication there that
13 those, you know, a preemption applies here. I mean,
14 they've squeezed out the state through just a
15 mandated federal structure.

16 The preamble to NOAA's most recent
17 regulations updating its consistency regulations, and
18 that's a lot of what we're talking about here is the
19 federal regulation and the Delaware program, which
20 I'll refer to as the Delaware, as the DCMP. But the
21 preamble shows for these most recent regulations show
22 that state court jurisdiction over consistency
23 determinations isn't preemptive. In the preamble,
24 NOAA responded to a comment relating to the State of
25 Washington Court of Appeals case with the Skokomish

1 Indian Tribe, and it's on the slides. Oh, by the
2 way, are the slides being changed as I speak, or
3 should I call out for slide changes?

4 MS. SAPP:

5 If you will just give me one moment and
6 then yes, you'll.

7 MR. BINTZ:

8 Yeah, mine's --- okay. Yeah, I'm on
9 slide three right now.

10 Okay.

11 So, under the facts of the case, the
12 tribe challenged the state agency's failure to object
13 to a consistency certification for a dam project.
14 And they failed to do this even though they sent a
15 letter at the same time, or at the time they were
16 doing it to the Applicant saying they thought it
17 didn't comply. So the commentator was --- was asking
18 NOAA to revise its regulations to clarify that state
19 agencies are required to concur or object to, clearly
20 concur or object a consistency certification.

21 And on the next slide, I talk about the
22 NOAA's response. I don't got to read the whole
23 thing, but part of what it said was that the State,
24 and this is talking about, you know, a Washington
25 State litigation dealing with, you know, a

1 certification being made by a party for, you know, a
2 project subject to these rules.

3 It said the State has an obligation to
4 enforce its federally approved CFP, and then it goes
5 on and says NOA, the authorizing federal agency, does
6 not have authority to dictate to a state its
7 interpretation of its own law. Here, part of my
8 claim is failure to comply fully with, you know,
9 Delaware notice requirements and the different
10 components of that.

11 I think NOAA's response, if we're
12 talking about this state case, and there's absolutely
13 no mention that somehow the court doesn't have to
14 have jurisdiction. And the discussion is clearly
15 that states have the responsibility of enforcing
16 their --- their CMPs. So it reflects both that
17 federal preemption doesn't apply, and this is coming
18 straight from NOAA, which you know, preemptively
19 governing regs right now and that state --- states
20 have a duty to enforce their CMPs. And it also
21 reflects that the state CMPs, coastal management
22 plans, are state law, not federal law. They're, it's
23 a state law, they're subject to jurisdiction and
24 oversight by --- by state courts and state bodies.

25 The NOAA recognition in its preamble

1 of, you know, state court jurisdiction is --- is
2 confirmed by a case that I cited in my brief with
3 Acme Fill Corp. And in that case, a state agency
4 adopts, excuse me, objected to Acme Fill's
5 consistency certification for expanding a waste
6 disposal site. And while the court case was pending,
7 Acme, who had, you know, initiated the lawsuit, it
8 had also, you know, I don't know the exact timing of
9 it, but they also had pending an appeal before the
10 Department of Commerce. Under the CZMA, if you have
11 an objection, you're allowed to appeal to the
12 Department of Commerce.

13 Now, the Department of Commerce doesn't
14 look to apply state law in making their decision.
15 They take into account whether to overrule its sort
16 of overall national, you know, interests as opposed
17 to what the state laws may see. So the Department of
18 Commerce granted that stay and didn't, and obviously
19 by doing that, didn't view the state board
20 presentation, excuse me, proceeding as being as in
21 any way being preempted by CZMA or --- or the
22 Department of Commerce proceedings.

23 Now, next slide on slide six. In
24 addition to DNREC's preemption argument, I think
25 being contrary to the CZMA statute, the legislative

1 history and then what I'm just talking about NOAA's
2 views showing it's preamble and --- and Department of
3 Congress's view showing a New Jersey Court decision.
4 It would create a rule under which US Wind, I think
5 could, you know, assert preemption to block the
6 appeal of state permits. And here's why.

7 DNREC's concurrence letters say that
8 the DCMP requires applicants to obtain all state
9 permits, then the letters themselves, the concurrence
10 letters, make obtaining departments a condition to,
11 you know, a condition to the letters. And both the
12 letters themselves, and there's also the regulations
13 say that if the conditions aren't met, the
14 occurrences --- concurrences are deemed to be
15 objections. So, you know, if one or more US Wind
16 permits were to be successfully appealed by a third
17 party, the concurrence letters then become
18 objections.

19 And that's functionally not that much
20 different from the appeal I filed. You know, if, you
21 know, I were to be successful in my appeal, but the
22 letters are revoked or overturned and remanded back
23 to DNREC, the result --- that the revocations are
24 canceled. And that's the same thing would happen
25 with a successful appeal. So if you're going to be

1 saying that, you know, CZMA preempts, you know, 6008
2 or jurisdiction under 6008 because, you know, if I
3 were to win, or even during the course of the
4 litigation delays things, the same thing really
5 happens, is going to happen with a permit. Somebody
6 appeals a permit and, you know, it puts things in a
7 hold for a while, a year or two litigation, if they
8 win, that the concurrence is deemed --- deemed an
9 objection.

10 So it really opens the door, for
11 example, for in the case of appeals, and I think it's
12 not unlikely that there could be some appeals, or for
13 US Wind or somebody else to argue that the appeals
14 are, you know, by third parties are preemptive. That
15 just can't be the case that that, you know, appeal of
16 a permit would be --- would be blocked by this
17 preemption theory. But it really parallels the
18 outcome appeal of a permit. It very similarly tracks
19 what the outcome of my appeal is of the --- of the
20 consistency certification.

21 In my brief, I cited, you know, a
22 number of cases from other jurisdictions. Obviously,
23 they're not binding on Delaware, but just to give a
24 sense that other states and courts are assuming
25 jurisdiction and --- or taking jurisdiction or have

1 jurisdiction and --- and rule on these things. DNREC
2 tries to distinguish the cases, but the distinctions,
3 you know, aren't relevant to preemption. So, for
4 example, and I won't give all the cites here, they're
5 in my brief, but for the Humboldt and Columbia River
6 cases, which I refer to as CAIN or a couple of names
7 in the, you know, in the litigation, and I probably
8 used a different database than DNREC did.

9 But, you know, DNREC says that they're
10 not analogous because they involve a consistency
11 concurrence for federal agency activities as opposed
12 to an activity for which a federal license or permit
13 is required. Is required, and that then they're
14 under different sort of subsections in the CZMA
15 regulations.

16 And so, you know, federal activity
17 would be, for example, the Army Corps of Engineers
18 dredging a harbor. And, you know, a federal license
19 or permit item would be, for example, US Wind getting
20 some permits from, and licenses, from --- from the
21 Army Corps of Engineers. So --- so they are, you
22 know, so they are different, but the consistency
23 determination is the same. They're both determining
24 whether the project is consistent with the --- with
25 the state CMP. So I think the analysis, you know,

1 carries over that's being challenged. It's the same
2 substantive issue that's being challenged.

3 There's another couple of cases. This
4 was sort of a different spin on the prior two ones I
5 was talking about. They're Stoeco and Anton cases,
6 and there DNREC's saying, well, those are different.
7 They're, YOU KNOW, where the state --- state agency
8 objected to the consistency determination as opposed
9 to concurring in it, which is what's happened here
10 with DNREC. But the --- but the, you know,
11 objections and concurrency, they involve the same
12 analysis. Just, you know, under one set of facts,
13 they determined it complied and another, it didn't.

14 You know, if anything, an objection
15 might have a slightly better argument. I don't know
16 if there's good arguments on this, that, you know,
17 the preemption is a little stronger because somebody
18 who's denied gets an objection. They can go to the
19 Department of Commerce and file an appeal. As I
20 mentioned earlier, it's not, you know, the appeal is
21 on a substantive compliance with the state CMP. It's
22 based sort of on a broader, national type issues.

23 Excuse me. Slide ten. Then there was
24 the Stoeco case, and there the comment was that, you
25 know, that no, you know, distinguishes I guess are

1 saying that because US Wind has, permits haven't been
2 issued, there's no decision ripe for appeal. The
3 comment may be a mix up. I'm not --- I'm not sure
4 because I didn't see CarMax as being involved in
5 Stoeco. But to address the likeness, you know, point
6 directly, DNREC's issuance of the concurrence
7 letters, that's --- that's DNREC's final agency
8 action. You look at DNREC's reply brief, they say
9 that once those currencies have been issued, DNREC
10 can't do anything more. It can't change its mind a
11 month later and do something different. It's a final
12 decision. Sure, there's federal agency approvals,
13 but those are separate. Those are not made by DNREC.
14 They're federal agency decisions.

15 Also, DNREC hasn't mentioned, there's
16 really two sets of approvals going on here. One is
17 the US Army Corps of Engineers for, I think it's like
18 a 404 permit and the Rivers and Harbors Act permit,
19 and that's still outstanding. I don't know the exact
20 status of it, but BOEM was also approving, you know,
21 what's called the construction and operations plan
22 for the project under some rules that are set up for
23 what's called, you know, out of continental shares
24 --- out of continental shelf plans. And that was
25 approved by BOEM on September 4th when it issued a

1 record of decision. So there isn't, you know, I
2 don't view it as relevant, but to the extent that
3 that's being pointed to, well the BOEM approval has
4 been granted.

5 Also, again, and I think I mentioned
6 this. The Stoeco Corp didn't mention, you know, the
7 grant or denial permits as being a factor in whether
8 to exercise jurisdiction.

9 Then there was an Ogburn-Matthews case.
10 And I think some --- I think DNREC's comments need
11 some clarification, or at least the way I read it, I
12 think it needs --- needs clarification, since it
13 could be read as saying that the case was overruled
14 by a Brown case and was then dismissed by the
15 Administrative Law Court in this Keyserling decision.
16 But in the case, you know, the South Carolina Court
17 reversed and remanded state agency consistent ---
18 consistency concurrence. We'll move to slide ---
19 slide 12.

20 But Brown was an entirely different
21 case from the Ogburn case and it didn't overrule
22 Ogburn as the DNREC brief seems to suggest. The
23 Court stated, in the Brown court, stated in a
24 footnote that as I said, it was a completely
25 different case and there was a number of years,

1 significant number of years between --- between the
2 cases and the Brown court, it was a Supreme Court of
3 South Carolina, said in a footnote that to the extent
4 that the Ogburn-Matthews case and another case held
5 that the South Carolina CMP certifications aren't
6 reviewable under South Carolina's APA rules that were
7 overruled. But the Ogburn Court never ruled on the
8 APA issue. It made its decision based on the case
9 coming in front of it like a certiorari process, so
10 and said we don't need to get to that APA issue.

11 And then the Ogburn, so the Ogburn
12 reverse and remand remained completely untouched.
13 There was no change to it. And then the Billy
14 Keyserling case that's cited in sort of the comments
15 after the cites, that has absolutely nothing to do
16 with the Ogburn case and was a later case. And you
17 can argue that, you know, it has some influence on
18 the law or reflects something about the law, but it
19 has nothing --- nothing to do with --- with the
20 Ogburn case.

21 And the last one here, and I'm going
22 through these because I think it's important to
23 understand what, you know, other jurisdictions are
24 doing, even though, you know, certainly not binding
25 on the Board here. So in that, DNREC says that it

1 was decided after a final decision on federal permits
2 was that the Board didn't reach judicial review of
3 the agency, consistency review.

4 But the Board clearly exercised
5 jurisdiction in that case because it granted some
6 rejudgment in favor of the agency. And also in doing
7 that, the Board didn't discuss anything about permits
8 in the context that it's decided or it's exercising
9 jurisdiction. And it's not clear to me that federal
10 permits were issued in looking through the case.

11 Now turn to, this is slide 15. You
12 know, DNREC points to this Billy Keyserling case as
13 support for its positions. So in that case, the
14 Court held that it had no subject matter
15 jurisdiction. This is an Administrative Law Court.
16 It said that it had no subject matter jurisdiction
17 over consistency, concurrence. And a key part of the
18 ruling was that, and this is up front and it's not
19 entirely clear how fit in, but I think it was the key
20 --- key part of this and I'll get to why, was that
21 South Carolina CMP, coastal management plan, didn't
22 cover activities more than three miles offshore. And
23 this is part of what I mentioned earlier. States
24 can, you know, sort of, you know, create within the
25 federal framework, their coastal --- their CMPs

1 though and the way they want. And one of the things
2 they do is they create a list of federal licensing
3 permit types of activities that they're going to
4 apply, you know, their CMP to.

5 And in South Carolina, theirs didn't
6 apply to anything that was more than three miles
7 offshore, and the seismic testing at issue in the
8 Keyserling case was --- was further offshore. So,
9 the only way the state agency, the South Carolina
10 state agency, was able to review it, this was they
11 had to get permission from NOAA to do it. And the
12 Keyserling court didn't view that as quite enough.
13 It, you know, it seemed to be that if you want to be
14 able to, you know, pursue an appeal under the state's
15 APA, under what they call a contested proceeding, you
16 need to have --- you need to have, you know, in the
17 statute, you know, an issue that you have rights to
18 pursue, not some type of separate process where you
19 get special permission from --- from NOAA to do a
20 review.

21 In the case, DNREC quotes from a NOAA
22 letter that says that, you know, once a state agency
23 issues a concurrence or conditional occurrence, it
24 stands regardless of later state administrative
25 action. And you know, I think the letter is correct

1 on that. I don't think a state can change its mind.
2 It can't issue its concurrence and then, you know, 30
3 days later decide it's going to change its mind. But
4 it's clear that language covers administrative
5 action. It doesn't say anything about judicial
6 review or judicial action. And from what I can tell,
7 this letter was, you know, obtained by the, you know,
8 private party that was the developer that wanted to
9 do the seismic testing. So I would think they would
10 be pressing NOAA to, you know, they would love to get
11 a letter from NOAA saying that state proceedings are
12 appropriate, but that's certainly not in a, what they
13 said in this letter.

14 Also, this is on slide 16. Both before
15 and after Keyserling and South Carolina Courts have
16 exercised jurisdiction over state agency consistency
17 determinations. And I cite a number of, you know,
18 administrative court cases and court cases after this
19 Keyserling decision where South Carolina is
20 exercising jurisdiction over federal consistency
21 determinations.

22 DNREC also relies on Weavers Cove as
23 part of its argument for preemption. I cover that a
24 bit in my brief, but a couple of things here. the,
25 in saying that preemption applied, it was a case of

1 the Natural Gas Act preempting a state law. It
2 wasn't anything with the CZMA preempting anything.
3 In fact, you know, and in spite of the Supreme Court
4 case, you know, and this is the District Court case
5 with Weavers Cove. And it said that, and it's a
6 quote, Congress clearly intended the Natural Gas Act
7 occupy the entire field of liquid natural gas
8 regulation, closed quote.

9 And we have nothing like that here, you
10 know, but he said that, like that about the coastal
11 zone. The states have a very active role in the
12 coastal zone and nothing similar to that can be said
13 about the CZNA. So I don't --- I don't think you can
14 take the Natural Gas Act, which is recognized in the
15 case law as having extremely broad preemption powers
16 and use it to transport that over and --- and try to
17 apply that for the CZMA to preempt the court's
18 jurisdiction here under a valid statute, a state
19 statute, 6008, and certainly not reflected by the way
20 NOAA views things as evidenced at the time it issued
21 its prior regulations or by the New Jersey Court
22 where the Department of Commerce, you know, stayed
23 its proceedings to allow a separate state proceeding
24 to proceed.

25 Also, you know, CZMA is not alone in

1 this as far as setting guidelines. For example,
2 state certifications under 401 of the Federal Clean
3 Water Act have to be issued or denied within one
4 year. You know, Delaware has implemented it
5 programs. It's in the cite that I mentioned in the
6 slides on 17, and it includes the one year deadline.
7 And it's very clear that DNREC 401 certifications can
8 be appealed under 608. So concept of oh well, we've
9 got a locked in one year deadline. We can't upset
10 that statutory scheme. You know, that's the
11 deadline. So it keeps things moving along just as
12 this six month rule does in the CZMA.

13 That doesn't mean that there can't be
14 judicial review of what's happened by that deadline.
15 I mean, the deadline serves its purpose of keeping
16 the process moving forward, but it doesn't say
17 anything that somehow you can't have judicial review
18 of a decision that --- that, you know, may well be
19 incorrect.

20 The --- as far as Section 608
21 jurisdiction, DNREC's claiming that the Board doesn't
22 have it because the CMP regulations are issued under
23 Delaware law or Chapter 60. And it also claims that,
24 you know, we've talked about a little bit that
25 there's no federal agent --- agency action. But the

1 DNREC authority issued regulations doesn't come from
2 the federal government. I think the General Assembly
3 of Delaware would completely disagree with that. And
4 if you look at 29 Delaware Code 1131, I think that
5 makes it pretty clear that, you know, that the
6 authority to issue regs, which the DCMP rules on the
7 regulations, comes from the General Assembly. Again,
8 they have to comply with the general framework the
9 CZMA sets up. But there are Delaware rules.

10 The, excuse me here. So also, and I
11 cite this and exhibits in my --- my brief where the
12 secret, some secretary order issuing updates to the
13 DCMP. They cite the 6010, which is a chapter,
14 obviously of Chapter 60, Title 7, as the authority
15 for the regulations. They do also in some cases
16 mention the federal statute, but you know, I'm not
17 sure they were, you know, going to write an
18 explanation of how this all fit together, but the key
19 of it is that the regulations are issued under 6010.
20 They're not issued through some separate authority
21 granted by the federal government.

22 And even setting aside this whole
23 discussion of, you know, Chapter 60, you know, you
24 read the plain language of 68, it covers my appeal.
25 It falls squarely under the language of 68. And the

1 Delaware Supreme Court has held that the plain
2 language of a statute governs unless it's ambiguous.
3 And you know, there's just not much --- there's just
4 no ambiguity there. It talks about, you know, being
5 aggrieved by, you know, a DNREC decision. That's ---
6 that's what's going on here.

7 CHAIR:

8 Mr. Bintz, just a heads up.

9 MR. BINTZ:

10 Also ---.

11 CHAIR:

12 It looks like you've got about five
13 minutes left in the 30 minutes.

14 MR. BINTZ:

15 Yeah, okay.

16 CHAIR:

17 Thank you.

18 MR. BINTZ:

19 This is --- this is the last point, so
20 that's actually working well. Thank you.

21 The last item is is that 7 Delaware
22 Code 6001(v)(2) which states the Chapter 60 policy.
23 That supports exercise of jurisdiction. It says, you
24 know the state, an exercise of its sovereign power
25 acting through the Department, DNREC, should control

1 the development and use of the land, water,
2 underwater, and air resources at the state. So here,
3 you know, DNREC and, you know, the oversight of the
4 courts fit squarely in that. That's part of the
5 state's sovereign power and it shouldn't be walked
6 away from this. And really important decisions being
7 made here that, you know, I'm, you know, DNREC can be
8 stretched. They do, you know, a great job, but
9 sometimes, you know, people are going to get things
10 wrong and that's, you know, throughout --- throughout
11 government. You need the court system as sort of a
12 check and balance on the executive branch.

13 So, I'll wrap up with that and
14 obviously happy to answer any questions.

15 CHAIR:

16 Thank you, sir. Questions from the
17 Board? Mr. Horne, are you good?

18 MR. HORNE:

19 I'm good.

20 CHAIR:

21 Okay.

22 Mr. Bintz, a question for you. As this
23 relates to the coastal zone and associated
24 regulation, why do you feel the Environmental Appeal
25 Board's the right appellate body versus the Coastal

1 Zone Review Board?

2 MR. BINTZ:

3 Well, the Coastal Zone Review Board
4 deals with, you know, sort of, I'm not an expert on
5 it, but sort of I think industrial development in
6 coastal areas. The CZMP regulations note that
7 program and it's sort of built in a little bit. But
8 it's only one small component of what's reviewed as
9 part of the process.

10 And I think this Board and a court or
11 two has held that. You know, CZMA issues where
12 you're dealing with this sort of industrial
13 development thing is under the CZMA. But I don't see
14 the basis here. There's no, you know, maybe there's
15 an argument, maybe others will argue it, but you
16 know, this is not something I see as falling within
17 the Coastal Zone Act. It's the Coastal Zone
18 Management Act. And I think it's more the similarity
19 in the names that can create confusion.

20 But I don't think DNREC would --- would
21 argue that this is somehow a Coastal Zone Act issue
22 as opposed to a Coastal Zone Management Act issue
23 which is, you know, read or promulgated under
24 regulations under Chapter 60. I believe the Coastal
25 Zone Act has its own separate provision for --- for

1 granting regulations, and those things go through the
2 Coastal Zone and Industrial Board.

3 CHAIR:

4 Thank you, sir. Any other questions
5 from the Board?

6 MR. MULROONEY:

7 I guess I'd like to understand, too,
8 from your perspective that the Board hears this
9 appeal and finds in favor. What --- what do you, I
10 guess what do you sense would happen from the federal
11 permitting process as a result?

12 MR. BINTZ:

13 Well, I think what would happen, I
14 think it would likely be a reverse remand. I guess
15 it's just like course that the Board's not going to
16 substitute its decision --- its judgment for --- for
17 the agency. It'll kick it back to DNREC. I think to
18 some extent, it may depend on what the ruling is in
19 favor of ---of my appeal. One of them is that the
20 certification delivered by US Wind was invalid. The
21 regulations, a very specific language that has to be
22 used in the certification, it's in quotes. It's not
23 you got to say this. It says, you say this and it's
24 in quotes, and US Wind delivered a watered down
25 version of it.

1 It's not clear. The certification
2 looks like it was included in a report of a
3 consultant. So it wasn't even signed by US Wind. It
4 provided watered down language. And, you know, if it
5 just doesn't comply on its face, I think there's ---
6 I would take the view that they never even started,
7 you know, the process.

8 So I think the process probably should
9 just start over, you know, to me. That I was, you
10 know, I commented on this in the comment period. I
11 was surprised that that's the action that wasn't
12 taken because it's, you know. They could go back and
13 and fix the things that they didn't get right, do the
14 analysis on. The other point I had made is that they
15 didn't take into account secondary effects. For
16 example, one of the, for --- for the subaqueous ---
17 subaqueous land regulations, they're required to take
18 into account the impact on, you know, aesthetics and
19 view --- viewscape. And they didn't do that, and
20 that's a really significant issue.

21 And I don't think, you know, I --- you
22 know, obviously I wasn't involved directly in the
23 DNREC review, but it was, right now US Wind has on
24 its website saying that it's going to use this
25 technology called alternative detection lighting

1 system, which would mean that the flashing lights at
2 night would only come on, you know, when an aircraft
3 is in the vicinity. So 99 plus percentage of the
4 time, it wouldn't be on.

5 But when you look at the environmental
6 impact statement, almost everywhere says that just
7 plain blank it's going to be installed. That's what
8 US Wind's website says, and that's just plain untrue.
9 The ADLS system has not been approved yet for
10 offshore wind projects. It needs approval from the
11 FAA, from the Coast Guard, but a number of approvals
12 that have been obtained. And US Wind has to decide
13 that it's economic, commercially feasible for them to
14 do it.

15 So, you know, had me handicap that, I'd
16 say it's well less than 50 --- 50 percent it's
17 happening. But if you read the, you know, US Wind
18 website and you read the environmental impact
19 statement, you'll walk away thinking something
20 different. So, I don't know maybe whether DNREC
21 spotted that problem or however many people did, but
22 to me that was a really troubling aspect of this that
23 you could get something so important, the nighttime
24 viewscape with those flashing lights is a big deal.

25 And so, I would make the case that the

1 claims I'm making, particularly the certification
2 that was delivered, that just plain doesn't meet the
3 very clear requirements of the regulations. It
4 doesn't even entitle US Wind to --- to start and
5 start the process of the six month review period.
6 And if it does, you know, something could be
7 negotiated out. If they refused, you would have a
8 final decision where I could, I or others, could go
9 to Army Corps of Engineer or BOEM and say, hey, you
10 know, you had --- I've got a final court decision
11 here or a final board decision here saying that this
12 was an invalid certification.

13 And you know, my guess is they would
14 not go forward on this with a state court decision on
15 this. Particularly, you know, when you look at the
16 NOAA preamble to the regulation, it's very clear that
17 they view the CMP decisions, I would particularly
18 want on notice that something like this as being a
19 state law issue for the states to interpret. It's
20 not, you know, it flat out say it's not, you know,
21 something that the federal courts can rule on.
22 They're not going to rule on state law issues.

23 MR. MULROONEY:

24 But from, I guess from a practical
25 standpoint, do you believe that the federal

1 permitting process would stop as a result of if the
2 Board found in favor of your appeal?

3 MR. BINTZ:

4 Well, I --- I think there's a good
5 chance it would. There was, I could find it and sent
6 it to Zach and get it to you guys. I did a footnote
7 to one of the South Carolina decisions that the
8 Administrative Law Court noted that, you know, during
9 the, you know, when the Army Corps, I think they
10 mentioned the Army Corps of Engineers, you know, was
11 told that there was an ongoing proceeding. They sort
12 of halt things. They --- they don't, like, go out
13 full speed ahead. They --- they wait to see what the
14 outcome is.

15 I mean, there --- there's a lot at
16 stake here. This is not, you know, a sort of small
17 project with de minimis effects. This --- this is a
18 major project that --- that needs to be made sure,
19 you know, up and down that it's done correctly. And,
20 you know, for the Board to exercise oversight on this
21 process is really important. Even though --- even
22 though I agree it's, you know, that it's not set in
23 stone or a clear, you know, this is what happens,
24 this is what happens next. There's clearly benefit.

25 And this is addressed in the case that

1 was discussed in the preamble. They talk a little
2 bit about, you know, mootness or right, this case was
3 --- argument was made. And they said well, you know,
4 the federal standard is what I quote on that. The
5 Supreme Court says that, you know, if there's any
6 sort of pathway or --- or benefit that is provided to
7 the plaintiff, the case isn't moot. And this fits
8 squarely in this. A ruling from the Board would be
9 very valuable and --- and would make sure that
10 important issues here, including this ADLA issue,
11 ADLS issue, you know, including providing a real
12 certification that has teeth and is not a watered
13 down version are properly handled.

14 MR. MULROONEY:

15 Thank you.

16 CHAIR:

17 Mr. Bintz, putting aside whether this
18 is a final action right of the secretary, you know,
19 we at times hear appeals that are actions of the
20 secretary that --- that don't distinctly grant an
21 appeal right to this Board. Why does --- why does
22 this concurrence, could you restate why this
23 concurrence submission is an act that's appealable to
24 this Board? What within the reg of DCMP directs that
25 appeal here?

1 MR. BINTZ:

2 Well, the CMP doesn't really address
3 that. That's the federal statute, and you have the
4 preamble saying that, you know, it's state law that
5 governs enforcement of the state CMPs. So I guess
6 the statute that DNREC would argue is being preempted
7 as 6008 because that's the appeal statute I'm, you
8 know, appealing under. And they're saying that's
9 preempted because if you take jurisdiction, you know,
10 you're somehow, you know, being inconsistent with the
11 federal CZMA program even though NOAA and Department
12 of Commerce don't seem to see it that way. And
13 there's quite a few other courts in other states that
14 have exercised jurisdiction on this. And we're
15 trying to find the language of 6008(a), but it's very
16 clear that it picks this up. You know. You know, I
17 laid out my initial brief, the appeal to standing
18 that I have on this and that has not been questioned.
19 Let me see if I can find 6008.

20 I think it --- I think it says that
21 basically any person who's aggrieved by a decision of
22 the, you know, the secretary or DNREC, you know, has
23 this right to appeal within 20 days to the appeals
24 warden. I see this is falling squarely within that.
25 I, you know, have been aggrieved by this decision, by

1 a decision of the secretary or DNREC here.

2 CHAIR:

3 All right.

4 Thank you, sir. Any other questions
5 from the Board?

6 MR. BINTZ:

7 Yeah. So it says it's substantially
8 affected by, I just found the section. Excuse me.
9 Any person whose interest is substantially affected
10 by any action of the secretary may appeal to the EAB
11 within 20 days. That's what I view as sort of four
12 squares covering the appeal I filed.

13 CHAIR:

14 Thank you, sir. All right.

15 DNREC?

16 ATTORNEY TRAVER:

17 Yes. So, we know a preamble cited by
18 Mr. Bintz does not contradict the preemption argument
19 that DNREC is making.

20 CHAIR:

21 Could you speak up just a little?

22 COURT REPORTER:

23 Yes, thank you.

24 ATTORNEY TRAVER:

25 The NOAA preamble cited by Mr. Bintz

1 does not contradict the preemption argument that
2 DNREC is making. The preamble Mr. Bintz cited
3 referred to the State's obligation to enforce its
4 laws and provide for public input. The CMP
5 regulations do provide for public input within that
6 six month timeframe.

7 NOAA's preamble to its 2000 amendment
8 to the CZMA regs states that the CZMA provides
9 predictability and finality by requiring the state
10 agency to concur or object within a prescribed time
11 period.

12 CHAIR:

13 Could you talk just a little bit
14 louder, please? Thank you.

15 ATTORNEY TRAVER:

16 The federal agency had, once that time
17 period has concluded, the federal agency has the
18 authority to take enforcement actions based on the
19 conditions. The state has no further authority. And
20 just to give the quote, a state cannot, through the
21 CZMA, enforce its conditions after it has concurred.
22 The state may request that the federal agency take
23 enforcement action or may seek a court order against
24 the applicant. After that six month time period
25 runs, the state has no further involvement.

1 I won't run through all of the
2 distinguished case law again. I will just refer to
3 my site and my reply brief and concisely restate that
4 many of the cases Mr. Bintz cited were very
5 procedurally different to what we're facing here.

6 And as far as the subpart (e)
7 distinction, Mr. Bintz referred to one of BOEM's
8 approvals under subpart (e). Subpart (e) is also
9 subject to that six month time period. It just
10 refers to activities taking place in the outer
11 continental shelf.

12 Finally, Mr. Bintz tries to distinguish
13 Keyserling on the grounds that it is a review of an
14 unlisted activity. However, once --- so, for listed
15 activities that a state has listed in its CMP
16 regulations, they automatically get to undertake
17 federal consistency review. For unlisted activities,
18 the state has to request to NOAA that they can
19 undertake federal consistency review. But once NOAA
20 grants that approval, the process is exactly the same
21 as the federal permit approvals at issue here.

22 So, Keyserling was addressing the same
23 six month timeframe limitation that we are subject
24 to.

25 COURT REPORTER:

1 I'm sorry, can you speak up just a
2 little bit more?

3 ATTORNEY TRAVER:

4 I'm done now.

5 COURT REPORTER:

6 I'm so sorry.

7 ATTORNEY TRAVER:

8 If the Board has any questions, I'm
9 happy to take them.

10 CHAIR:

11 Questions from the Board? No? Okay.

12 Mr. Horne, are you good?

13 MR. HORNE:

14 I'm good.

15 CHAIR:

16 So for DNREC, assuming the project
17 moves forward and the relevant permits are issued by
18 BOEM and US Army Corps, is there any permitting
19 that's going to be required from the state of
20 Delaware or other state agency that you're aware of?

21 ATTORNEY TRAVER:

22 No, the state has to issue its own
23 permits for US Wind. So that's a separate process
24 that is ongoing.

25 CHAIR:

1 And then, and I think we covered this.
2 In the event that the conditions and the conditional
3 concurrence are not met, then those become deemed
4 objections? Would you agree?

5 ATTORNEY TRAVER:

6 If, no. At this point, because that
7 six months' time period has run, if the conditions
8 aren't met, the state has to request that the federal
9 agency will enforce them. If they're included in the
10 application, then the federal agency will enforce
11 them outright. Included in the approved application.

12 CHAIR:

13 Other questions? Mr. Horne, you good?

14 MR. HORNE:

15 Yes.

16 CHAIR:

17 Okay.

18 Is there a motion to go to Executive
19 Session?

20 MR. HORSEY:

21 I move we go to Executive Session.

22 MR. MULROONEY:

23 Second.

24 CHAIR:

25 All right.

1 So we're going to move to Executive
2 Session. I suspect no objection, but Ms. Sapp,
3 you've got an ability to get in touch with Mr. Bintz?

4 MS. SAPP:

5 Yes.

6 CHAIR:

7 Okay.

8 Very good.

9 MR. BINTZ:

10 So is the Board going to come back and
11 rule shortly or today? I'm not familiar with this
12 process.

13 CHAIR:

14 Yeah, my --- my expectation would be
15 within the hour or so we'll have some information for
16 you on the timing. That we would likely come back to
17 public session at that point for further discussion.
18 So I would expect you to stand by here and the staff
19 will reach out to you to give you some information on
20 timing, but we'll come back together here.

21 MR. BINTZ:

22 Okay.

23 So that's smart. Okay, great.

24 Appreciate that. And so, I should stay on the
25 weblink here and just wait for a phone call that

1 you're coming back in?

2 CHAIR:

3 Yes sir, that would work well.

4 MR. BINTZ:

5 Okay.

6 Thank you.

7 CHAIR:

8 Thank you.

9 ---

10 (WHEREUPON, A SHORT BREAK WAS TAKEN DURING THE
11 PROCEEDING.)

12 ---

13 CHAIR:

14 All right.

15 Back in public session. Is there a
16 motion from the Board?

17 MR. HORSEY:

18 I would like to make a motion.

19 CHAIR:

20 Mr. Horsey.

21 MR. HORSEY:

22 I move that we deny DNREC's Motion to
23 Dismiss.

24 CHAIR:

25 All right.

1 We'll do, let's see. Is there --- we
2 have a motion. Is there any discussion on the
3 motion? All right.

4 We'll do a roll call vote. Mr. Horsey?

5 MR. HORSEY:

6 I agree.

7 CHAIR:

8 Ms. Wicks?

9 MS. WICKS:

10 I agree.

11 CHAIR:

12 Mr. Mulrooney?

13 MR. MULROONEY:

14 I would agree.

15 CHAIR:

16 Mr. Horne, a thumbs up in favor or
17 thumbs down opposed. In favor. Thank you, sir.

18 I'm going to vote in favor of the
19 motion. Motion passes unanimously. The --- the
20 Board's decision, written decision will be issued
21 within 90 days. And I believe RAG will work on
22 starting to schedule the next document submissions
23 and --- and next prehearing conferences to support a
24 pending hearing on the merits.

25 And with that, today's hearing is

1 ended. Thank you very much.

2 MR. BINTZ:

3 Thank you.

4 * * * * *

5 HEARING CONCLUDED AT 10:50 A.M.

6 * * * * *

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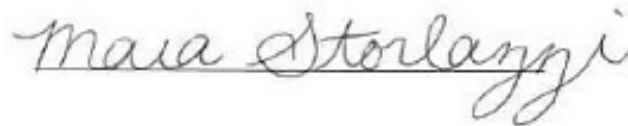
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CERTIFICATE

I hereby certify, as the stenographic reporter, that the foregoing proceedings were taken stenographically by me, and thereafter reduced to typewriting by me or under my direction; and that this transcript is a true and accurate record to the best of my ability.

Dated the 25th day of October, 2024.

A handwritten signature in cursive script that reads "Maia Storlazzi". The signature is written in dark ink and is positioned above the printed name.

Maia Storlazzi,

Court Reporter

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