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Case No. S25A-01-001 MHC

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CAESAR RODNEY INSTITUTE, PAUL "WES" TOWNSEND and GEORGE MERRICK, NATALIE C. MAGDEBURGER, Individually and as Mayor of and on behalf of TOWN OF FENWICK ISLAND, a municipal corporation of the State of Delaware, and TOWER SHORES BEACH ASSOCIATION, a Delaware non-profit corporation, *Appellants,* v. THE HONORABLE SHAWN M. GARVIN in his official capacity as Secretary of the Department of Natural Resources and Environmental Control and STATE OF DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL, *Appellees*.	)	C.A. No. 25A-01-001MHC On Appeal from Decision of Shawn M. Garvin, Secretary of the Delaware Department of Natural Resources and Environmental Control Dated December 9, 2024, Order No. 2024-W-0051 - Coastal Construction Permit Re: Tax Map 134-5.00-3.00, Delaware Seashore State Park, Appl. No. BP-TBD

APPELLANTS' OPENING BRIEF

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STATEMENT OF THE CASE

The Appellants bring this appeal from the Decision of Shawn M. Garvin (hereinafter "Garvin"), then-Secretary of the Delaware Department of Natural Resources and Environmental Control (hereinafter "DNREC"), dated December 9, 2024, Order No. 2024-W-0051, as it relates to the approval of a Coastal Construction Permit regarding proposed construction in the ocean and public beach areas at the Delaware Seashore State Park (Tax Map 134-5.00-3.00)[1].

US Wind, Inc. (hereinafter "US Wind") holds a federal lease and has entered into contracts with the State of Maryland for the purpose of constructing an offshore wind project, titled the "Maryland Project," to generate electricity from offshore wind turbines. US Wind has sought various federal, state and local approvals related to the Maryland Project (hereinafter "Project").

US Wind proposes to bring the electricity generated by its offshore turbines ashore via multiple high-powered transmission lines. Maryland local governments and subdivisions declined to allow the transmission lines from the turbines to come ashore in their jurisdictions.

The State of Delaware became involved when, in December 2023, Delaware's

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1 *See* letter, Appendix E to Decision of Dec. 9, 2024. Appeal from a decision of the Secretary granting a Coastal Construction Permit is taken directly to this Court, pursuant to 7 *Del. C.* §6803(d). (V1-5445-5448).

Governor entered into a proposed agreement ("Term Sheet")[2] with US Wind that would create a lease for the purpose of allowing the transmission lines from the Project to make landfall in and under the lands of the Delaware Seashore State Park, at the Delaware State Park public beach and fishing area known as 3Rs Road. From there, the transmission pipelines would then traverse into and through the adjacent Delaware Bays, to an inland substation, from which the power would be sent to Maryland.

Relevant to this appeal, US Wind applied for a number of permits from DNREC, including specific to horizontal directional drilling, laying cable pipelines and other coastal construction activity on and under the waters and lands of Delaware Seashore State Park/3Rs Road – activity which requires a coastal construction permit ("CC Permit)[3] pursuant to 7 Delaware Code Chapter 68, titled Beach Preservation. CC Permits are administered by the Secretary of DNREC and are subject to rules

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2 The Term Sheet is referenced in the Secretary's decision, as well as several of the documents created after the close of the public record (*see* A-78, 103, 121 (R-V1-4899, 4917, 5475)) but was not included in the public record. It was also raised as a potential conflict of interest by several Plaintiffs and other public commenters (*see e.g.* A-257, 261, 301 (R-V2-44, 48, 52, 566 and others). A copy is attached here as Exhibit 1.

3 In addition to the CC Permit, US Wind also applied to DNREC for a Subaqueous Land Lease, a Subaqueous Lands Permit, a Wetlands Permit, and a Water Quality Certification, relevant to various aspects of the Project. Appeals of the grants of the Wetlands permit, and the Subaqueous Lands-related permits are separately pending before the Environmental Appeals Board.

and regulations at 7 DE Admin. C. 5102.[4]

On or about April 28, 2024, DNREC filed formal "Public Notice" of receipt of US Wind's applications, in several newspapers. (*See* A- 1-2, (R-V1-563-568)). These public notices advised that DNREC had received "permit applications submitted by US Wind" and that DNREC proposed to hold "a Joint Public Information Session and a Joint Public Hearing (DNREC Docket #2024-P-MULTI-0007). (*See e.g.* A-2 (R-V1-566)). The public was advised that it could obtain the "applications and supporting documents" online or "for more information as to how you can inspect a physical copy of these documents" to contact certain personnel at DNREC by email or phone. *Id*.

DNREC also posted a website page where documents were posted via links to different components of the voluminous materials. (A-3-9) (R-V1-569-575). As to the Coastal Construction permit specifically, only one link was provided, as follows:

4 https://regulations.delaware.gov/AdminCode/title7/5102

Division of Watershed Stewardship:

Beach Preservation Coastal Construction Permit

The applicant seeks authority under the Beach Preservation Act to utilize directional drilling for the installation of export cables and to construct four transition vaults in the 3R's parking lot in Delaware Seashore State Park, Sussex County.

Documents for Review

- Coastal Construction Application

A citizen who clicked on "Coastal Construction Application" was then taken to a 34-page document.[5] Within this document one found:

- 2 pages (A-10-11) (R-V1-231-232) consisting of application questions and answers;

- followed by 12 pages of technical drawings (A-13-23) (R-V1-233-244);

- which was then followed by a letter from US Wind to DNREC, dated February 15, 2024. This letter addressed not only the coastal construction, but also the Wetlands and Subaqueous Lands Application and the Water Quality Certification Request. (A-24-27) (R-V1-245-248).

- This correspondence itself then referred the reader to a very large quantity of technical "narratives and attachments" (not linked), including multiple appendices to the *federal* COP submitted to the Bureau of Ocean Management (BOEM); other reports, claimed to be "confidential," which could be "provided by request", references to an "Application Narrative", which was a 298-page document[6] (not presented as tied to any particular permit and which was linked from a small, shaded box[7] with no description, on a page of the DNREC

5 See A-10-43 (R-V1-231-264).

6 The Narrative is presented in the Record at R-V1-265-562.

7 The "Coastal Construction Application" did not direct the reader as to how or where to find the "Narrative."

website) (R-V1-570), and finally certain (but not all) materials from the Wetlands and Subaqueous Lands Permits were listed. *Id.* (R-V1-246-248; *see also* R-V1-572).[8]

- A letter signifying DNREC's consent to US Wind's submission of an application for permits to use the public lands (3Rs Beach) (A-29) (R-V1-250).

- And finally, additional technical drawings and a list of abutting properties to 3Rs beach (A-30-43) (R-V1-251-264).

No reference was made in the public notices to the applicable Delaware statutes or administrative regulations which governed the Coastal Construction permit, or any of the other permits being applied for.

Although each of the respective, pending permits was independent, and governed by its own regulatory and appellate criteria, DNREC elected to consider all permits in one joint application process, provided notice for one joint public information session, held one joint public hearing, and ultimately issued one decision and Order granting all of the multiple permits. Notably, the process was not compliant with the regulatory provisions for the Coastal Construction permit.

The public information session was held on June 5, 2024 at Beacon Middle School in Lewes, at which members of the public were advised that they could review information and ask questions about the Project, but that "questions and

8 This is an example of how difficult and confusing it was for a citizen to access and sort the information relating to the coastal construction permit. Most of the information in this correspondence dd not relate to the subject permit.

comments received at the Public Information Session are not part of the Hearing Record. . . ." (A-2) (R-V1-566).

On July 9, 2024 at 6:00 p.m., DNREC held a "Joint Virtual Public Hearing" on all of the aforesaid applications for permits. This hearing was moderated by Hearing Officer Lisa Vest. The hearing was entirely virtual. (A-51-52) (R-V1-8-9). Ms. Vest noted that the applicant (US Wind) was "required at our hearings to offer their own presentation explaining exactly what their proposed project is, what it entails, and specifically what it is that the applicant is requesting of the Department for any given permitting matter." (A-55-56) (R-V1-12-13). The Hearing Officer noted that there was a "vast amount of information" posted on the hearing webpage. (A-56) (R-V1-13).

Brief presentations were made by two Divisions of DNREC—the Division of Water and the Division of Watershed Stewardship, which consisted of PowerPoint overviews of the proposed activities. (R-V1-23-30; R-V1-30-35). The PowerPoints and other "exhibits" presented by the Divisions were then added to the "hearing page". (*Compare* A-5-6 (R-V1-571-572) and Exhibit 2).[9]

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9 Exhibit 2 is a printout of the Joint Permitting Hearing webpage as it appeared to the public during the public comment period in early August, 2024, including the Hearing Transcript and written comments received through August 5, 2025. Although not disputing the accuracy of the information on this document from its own website, DNREC refused to add this document to the Record, as Appellants had requested.

A representative of US Wind gave a similarly brief and high-level overview of the proposed Delaware activities, but did not discuss any technical aspects of the project or explain how or why it complied with the applicable statutes and regulations. (R-V1-35-44). As to the coastal construction permit application specifically, US Wind merely stated that the Applicant planned "horizontal directional drilling under the 3Rs Beach and dunes. . . building underground cable vaults. . .horizontal and directional drilling under the Coastal Highway and wetlands into the Indian River Bay and burying cables. . . ." (R-V1-36-37).

Members of the public who wished to make verbal comments were required to preregister before the hearing. (A-57) (R-V1-14). The public was specifically told that "none of the pending authorizations that you'll be hearing tonight . . .involve the potential construction of wind turbines"[10] and did not involve any aspect of the project that related to federal issues. (A-58-59) (R-V1-15-16). Commenters were advised that any comments pertaining to any federal issues, or to anything outside of the "four specific [Delaware] authorizations" would not be considered and "each comment must be limited solely to the subject matter of tonight's hearing." *Id* at A-59-60 (R-V1-16-17).

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10 This language was troubling and confusing, as it implied "authorization" (approval) was "pending" and disassociated the process from the wind turbines which were the essence of the entire project, and without which the Delaware applications would not exist.

Despite the complexity of the issues as to four separate permits, each verbal commenter was given only three minutes to speak at the hearing, after which time, their microphone was cut off. (A-61) (R-V1-18). Commenters were also advised that they could submit comments in writing and that the record would stay open for written comments until September 9, 2024. (A-61-62) (R-V1-18-19).

The Hearing Officer advised the public that the statutory purpose of the hearing was to "build the record" with regard to the pending applications. She described the record as consisting of "the transcript of tonight's hearing, all of the public comments, all of the exhibits, and eventually the hearing officer's report will be compiled and reviewed by Secretary Garvin," and that the Secretary would ultimately issue an order following his review of the record. (A-64-65) (R-V1-21-22).

The record remained open for written public comments until September 9, 2024. Evidencing the significant public interest and concerns about this Project, approximately 34 people offered public comments during the public hearing. (A-45-47) (R-V1-2-4), and approximately 412 written comments, totaling 971 pages, were submitted into the record. (*See* Record Volume 2, R-V2-1-11 (index); 12-982 (comments)).

On December 9, 2024, Secretary Garvin issued "Secretary's Order 2024-W-0042," granting all of US Wind's requested Delaware permit applications, including

the Coastal Construction Permit. (A-67-90) (R-V1-5464-5487). [11] Simultaneous with the Secretary's Order of December 9th, a host of additional materials which had been submitted by US Wind, totaling 501 pages were published, none of which had been posted on the hearing webpage or made part of the public record before the close of public comment. (*See* Exhibit 2). In addition, DNREC released approximately 61 pages of internal reports, including the Hearing Officer's Report and two Technical Response Memoranda, Draft Permits and a Draft Subaqueous Lands Lease.

None of these *hundreds of pages of additional materials,* directly related to the granting of the coastal construction, subaqueous and wetlands permits, were available to the public until December 9, 2024, the day the Secretary's Final Order was issued. (*See* A-143-144 (R-V1-4472-4473)). Clearly, at that point there was no opportunity for the public to comment on any of these documents.

This appeal was timely filed with this Court pursuant to 7 *Del.C.* §6803(d).

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11 Although not related to the current appeal, included in the record submitted to this Court by the State is an Order dated October 18, 2024 approving the Issuance of a Section 401 Water Quality Certification, required by the federal USACE, related to the offshore construction, along with releasing hundreds of pages of additional materials. (R-V1-5449-5463; 4504-4886).

STATEMENT OF QUESTIONS PRESENTED

I. IS THE SECRETARY'S DECISION APPROVING THE COASTAL CONSTRUCTION PERMIT ILLEGAL BECAUSE HE FAILED TO FOLLOW PROCEDURES SPECIFICALLY REQUIRED BY THE DELAWARE CODE AND REGULATIONS GOVERNING BEACH PRESERVATION AND COASTAL CONSTRUCTION PERMITS?

II. DID THE SECRETARY ILLEGALY VIOLATE APPELLANTS' DUE PROCESS RIGHTS BY ADVERSELY AFFECTING THE PUBLIC'S OPPORTUNITY FOR MEANINGFUL INPUT INTO THE PERMITTING PROCESS, AND BY BASING HIS DECISION ON MATERIALS WHICH THE PUBLIC DID NOT HAVE ACCESS TO FOR REVIEW AND COMMENT?

III. IS THE SECRETARY'S DECISION ILLEGAL AS IT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE OF RECORD, RELIES ON MATERIALS NOT PART OF THE PUBLIC RECORD AND DOES NOT INCLUDE COSIDERATION OF ALL RELEVANT FACTORS REQUIRED BY LAW AND REGULATIONS?

IV. DID THE SECRETARY ABUSE HIS DISCRETION AND ERR AS A MATTER OF LAW BY FINDING, WTHOUT FURTHER INQUIRY, THAT THE PROJECT, INVOLVING MILES OF CLEARLY INDUSTRIAL ACTIVITY, INCLUDING SUBSURFACE DRILLING AND LAYING OF PIPELINES, IN AND THROUGH THE SUBMARINE AND BEACH AREAS, DID NOT IMPLICATE THE COASTAL ZONE ACT?

ARGUMENT

I. THE SECRETARY ERRED AS A MATTER OF LAW BY FAILING TO FOLLOW PROCEDURES MANDATED BY THE DELAWARE CODE AND REGULATIONS GOVERNING BEACH PRESERVATION AND COASTAL CONSTRUCTION PERMITS.

DNREC is charged with protecting, conserving and acting in the interests of Delaware's natural resources. 7 *Del. C.* §6801 provides that the

> Beaches of the Atlantic Ocean and Delaware Bay shoreline of Delaware are hereby declared to be valuable natural features which furnish recreational opportunity and provide storm protection for persons and property, as well as being an important economic resource for the people of the State.

7 Delaware Code Chapter 68, Beach Preservation Act, governs and regulates coastal construction and regulates the protection of Delaware's coastal beach areas. 7 Del.C. §6801. All coastal construction seaward of the building line and certain landward activity require a permit. 7 Del. C. §6805.

Specifically, before any person or company can lawfully engage in activity "which is likely to have a material physical effect on existing coastal conditions or natural shore" (*See* 7 Del. C. § 6802(5)), they are required to make application to the Division of Watershed Stewardship ("Division")[12] for a letter of approval or permit

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12 The authority to adopt rules and regulations deemed necessary to effectuate the purposes of the Beach Preservation Act (7 Del. C. Chapter 68) is vested in the Department of Natural Resources and Environmental Control. 7 Del. C. Section 5801. Further, the definition of "Division" in the Administrative Code states "Division" means the Division duly authorized by the Secretary as responsible for administering the Regulations. The Department has apparently determined that the

from the Division. 7 Del. C. §6805.

US Wind applied for a Chapter 68 permit in connection with its proposal to engage in drilling, dredging and placement of high-powered electric cables under the Delaware near-ocean waters, the public beach and the coastal lands in and around 3Rs Road.

The Regulations Governing Beach Protection and Use of Beaches are found in 7 Delaware Administrative Code, 5102. These Regulations, which describe a general prohibition against construction seaward of a "building line", were to be established by DNREC.[13]

This Project would involve significant construction seaward of that line, which is expressly prohibited absent certain conditions. 7 DE Admin. C. 5102 §3.1.1. The requirement applies to construction, including that of a pipeline, without a permit. *Id.* §4.4 "Applications shall be considered and permits issued or denied by the Division in accordance with the purposes and intent of the Act and these Regulations." *Id*. §5.1.

Upon receipt of a permit application in proper form, the Division is required

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Division of Watershed Stewardship is the appropriate Division to administer the Act as that is how the section of the Administrative Code that contains the relevant regulations is titled.

13 A line, 100 feet landward, generally paralleling the coast. (§1.0, Definition of "Building Line".)

to advertise in both the affected county and a statewide newspaper that the application has been received, and provide a brief description of the nature of the application, as well as advise that comments will be received for a period of 15 days. *Id.* §5.2.1. The Division is also required to notify, by mail, all adjacent property owners and make the application available for public inspection in the Dover office of the Division. No decision is to be rendered by the Division until at least 20 calendar days after notice has been published, notice is mailed to the adjacent property owners, and the application has been made available for public inspection.

The Division is mandated to consider specific factors, including any comments received, the effect of the proposed construction on the shoreline and to any public lands or private property, protection of the State, the public and any adjacent landowners from actual and potential financial and property loss, as well as consideration of any "actual or potential hardships or benefits." (*Id,* §§5.3.1; 5.3.2.1, 5.3.2.2, 5.3.2.3). Upon consideration of the regulatory criteria, the Division "shall make a decision on the application which it determines will best implement the purposes of the Act and these Regulations." *Id*. §5.4.1. The Division "shall give written notice with reasons to the applicant, to adjacent property owners and other persons who have requested that they be notified of the decision on that application."

Id.[14]

Subsequently, "any person or persons, jointly or severally, or any taxpayer, or any officer, department, board or bureau of the state, aggrieved by any decision of the Division, may appeal to the Secretary" of the Department of Natural Resources and Environmental Control ("DNREC") and may request a public hearing, which request "shall be deemed meritorious when the appeal is not frivolous and the notice of appeal exhibits a reasonable familiarity with the Division's decision.". . §6.2.1 This is an *evidentiary* hearing under the Regulations. §6.2.1.2.

The required permitting procedures were not followed in this matter. Although there was publication of the joint permit applications, and written notification to adjacent property owners, the Division of Watershed Stewardship conducted no evaluation of the project, did not apply the applicable regulatory criteria (§5.3), did not issue a report evidencing that it considered the required elements, made no decision regarding the application, and made no written notification of a decision by the Division, with reasons, to the public, or adjacent property owners. Instead, DNREC entirely disregarded its own duly adopted regulations and process, bypassed this mandatory, regulatory framework and issued

14 Additional procedural requirements are listed in the regulations. However, they are not relevant herein, given the manner in which the Department and Division determined to proceed in this matter.

a final decision and permit.

Accordingly, the public and impacted parties were deprived of an opportunity to review the analysis, evaluate the determinations made by the Division, avail themselves of an evidentiary hearing process (See §6.0, *et. seq.)* and to be heard by the Secretary before he entered his decision.

DNREC is subject to all the rules and requirements of its own Regulations. §2.3.1. Further, when an agency enacts a regulation, the agency is bound to comply with the regulation unless and until it is properly amended in accordance with the Delaware Administrative Procedures Act. *Baker v. Del. Dep't of Nat. Res. & Envtl. Control,* 2015 WL 5971784 *13 (Del. Super. Oct. 7, 2015) *aff'd* 137 A.3d 122 (Del. 2016); see also, *Culver v State,* 956 A.2d 5 (Del. 2008) (probation officer failed to follow procedure to determine reasonable suspicion); *UPS v. Hawkins,* 314 A. 3d 663 (Del. 2024).

The Secretary was not authorized to issue a decision on a coastal construction permit application *ab initio* and without following the mandatory, non-discretionary procedures set forth in 7 Del. Admin. Code 5102. As a result of DNREC's failure to follow the required procedures, the entire permitting process is flawed. The decision to issue the permits must be reversed.

II. THE SECRETARY'S DECISION VIOLATED APPELLANTS' DUE PROCESS RIGHTS BY ADVERSELY AFFECTING THEIR, AND THE PUBLIC'S, OPPORTUNITY FOR MEANINGFUL INPUT INTO THE PERMTTING PROCESS.

The permitting process for beach, or coastal, construction is established in 7 DE Admin C. 5102, §5.1, *et. seq*. That process provides that the Division of Watershed Stewardship[15] is to consider the Application and issue a Decision from which the public, after review and evaluation of the Division's technical conclusions, could appeal to the Secretary, who then may choose to hold a public, evidentiary hearing. In this case, DNREC elected to consider the beach construction, subaqueous lands and wetlands permit applications in one joint application process, provided notice for one joint public information session, held one joint public hearing, and ultimately issued one decision and Order granting all the multiple permits.

In principle, DNREC's Environmental Permitting Process[16], as described by the Agency itself, emphasizes the importance of transparency and of notifying, and receiving comments from, the public in making permitting decisions. https://dnrec.delaware.gov/environmental-permitting/. (See Exhibit 3.) Here, as

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15 See Footnote 12*, infra*.

16 This is DNREC's general Permitting Process. As described above, by Regulation, (7 DE Admin. C. §5102), the Coastal Construction permit procedures differ somewhat in their order of proceedings, but similarly provide for public review and notice of applications materials.

explained in detail below, DNREC considered, and grounded its reasoning for approving the permits upon, various, critical documents submitted by the applicant after the close of the hearing and public comment period in violation of its Environmental Permitting Process. That action deprived the public of the opportunity to question and comment upon, indeed to be aware of, the supplemental information provided to DNREC after the close of the record.

In his decision, the Secretary (A-73) (R-V1-5470) outlined a list of key areas of concern raised during the public comment period, which were based upon the public's review of the original application materials provided.[17] These included, *inter alia*:

- Financial Stability/Bonding/Decommissioning
- Emergency Response
- Recreational Disruption
- Electromagnetic Fields ("EMF")
- Sediment/Water Quality.

Significantly. the following documents were submitted by the Applicant after

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17 Specifically, these comments were in the nature of pointing out the Applications' deficiency in demonstrating compliance with these factors, or adequately protecting against personal or environmental risks. (*See e.g.* A-271-273, 276-281, 282-295 (R-V2-321-23; 329-330; 356-360; 482-495)).

the closing of the public record and released with the Final Order:

- Indian River and Indian River Bay Surface Water and Sediment Assessment (dated September 13, 2024)(R-V1-4931-5257);
- Maryland Offshore Wind Project – Indian River Bay Turbidity Minimization and Monitoring Plan (dated September 13, 2024)(R-V1-5258-5286);
- Decommissioning Plan – Delaware (dated October 17, 2024)(R-V1-5287-5288);
- Emergency Response Plan (ERP) – Delaware version 1a (revised October 24, 2024 (R-V1-5289-5331);
- Maryland Offshore Wind Project – Monitoring Plan – Delaware (revised November, 2024)(R-V1-5332-5362)
- Maryland Offshore Wind Project Mitigation Plan – Delaware (revised October, 2024)(R-V1-5363-5369)[18]

Stated differently, the public identified critical omissions and deficiencies in the application materials and, after public comment was closed, the Department then asked or told US Wind what to supply to fill these holes in the original materials – with no notice to the public or opportunity to review or respond to the additional materials. The Secretary characterized the information as supplemental ("US Wind was required to submit the following supplemental information to the Department") (A-74) (R-V1-5471), and subsequently declared that the information was "expressly

18 These documents appear in full at R-V1-4931-5369 in the Appeal Record to this Court, (*See also relevant excerpts at* Appendix at pages A-148-245).

incorporated into the Record." *Id.*

The Secretary then went on to address each of the "areas of [public] concern." (A-73) (R-V1-5470), As to each of them, the evidentiary materials cited and relied upon to support the Secretary's determination that US Wind had satisfied the concern, and further, to justify the decision to grant the permits, came *entirely* from the new "supplemental" materials, received post public hearing. This was an error of law in that reliance on these non-public materials constitutes a violation of Appellants' and the public's due process rights.

The input of the public is critical in the administrative environmental permitting process. The consideration of documents not in the administrative record and not made available to the public prior to the issuance of administrative decision not only deprives the public of the right to meaningfully participate in the process, but dispossesses the reviewing agency of essential public comment to evaluate the proposed project. See, e.g., *California v. Block*, 690 F.2d 753 (9th Cir. 1982), recognizing the importance of opposing viewpoints in a decision-making process "to ensure that an agency is cognizant of all the environmental trade-offs that are implicit in a decision." *Id* at 770. The "voice of the community is an important element to public hearings." *Bethany Beach Volunteer Fire Co. v. Bd. of Adjustment of Bethany Beach*, 1998 WL 733788 (Del. Super. 1998).

The participation of the public in the process "ensures that [an] agency will

not act on incomplete information," *Marsh v. Oregon Natural Res. Council,* 490 U.S. 360, 371 (1989). In *National Wildlife Federation v. Marsh*, 568 F. Supp. 985 (D.C. D. C. 1983), the court found that information received "*after* the close of the comment and hearing period had the effect of shielding essential data and the agency's rationale from public hearing and comment. *Id* at 994(emphasis in original) Public participation ensures that "the public…will be able to analyze and comment on [an] action's environmental implications." *Nat'l Audubon Soc'y v. Dept. of the Navy*, 422 F.3d 174, 184 (4th Cir. 2025) The purpose of public notice is to make environmental documents available to inform interested or affected persons and facilitate public involvement in decisions affecting the environment to ensure that "the most intelligent, optimally beneficial decision will ultimately be made." *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n.* 449 F.2d 1109, 1114 (D.C. Cir. 1971).). "Notice does not foster involvement unless environmental information is available to public officials and citizens *before* decisions are made and *before* actions are taken." *WildEarth Guardians v. United States Office of Surface Mining, Reclamation & Protection,* 104 F. Supp. 3rd 1208, 1224 (2015), 104 F. Supp. 3d 1208 (D. Colo. 2015), order vacated, appeal dismissed, 652 F. App'x 717 (10th Cir. 2016). (emphasis in original).

Ohio Valley Environmental Coalition, et al. v. United States Army Corps of Engineers, et al., 674 F.Supp.2d 783 (S.D. WV 2009) presented a procedural

situation strikingly similar to the present matter. In *Ohio Valley*, the Court interpreted public notice requirements under the federal Clean Water Act and the National Environmental Policy Act similar to the DNREC environmental permitting process in the case at issue here. The Court found that the Army Corps failed to provide adequate notice and an appropriate opportunity for pre-decision public comment concerning surface mining permits. *Id* at 786. The mining company applicant submitted additional documents, containing substantive environmental information, after the close of public comment. *Id* at 794. The documents contained a detailed analysis of practical alternatives, including a comprehensive description of how mining would proceed under the proposed plan as well as actions to mitigate adverse impacts of the mining.

Approximately one year after the closing of the hearing, the mining company applicant submitted an initial comprehensive plan to the Corps, which the Corps circulated to other federal agencies for review and comment. *Id.* Subsequently, the company sent the Corps two letters with information to supplement this plan.. The plan and supplemental analysis of potential adverse environmental effects and mitigation measures were not distributed to the public for comment. *Id.* Environmental groups sued for a declaratory judgment that the supplemental information could not be considered without public notification. *Id* at 788.

The Court in *Ohio Valley* found that the Corps failed to give the public clear

and adequate notice of the mining proposal under consideration and failed to enable meaningful public comment thus depriving the public of a meaningful opportunity to provide input on the project. *Id* at 800. Equating the permitting process to rulemaking, the Court relied on *Connecticut Light & Power v. Nuclear Regulatory Commission*, 673 F.2d 525 (D.C. Cir. 1982), which determined that: "If the notice fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposal. As a result, the agency may operate with a one-sided or mistaken picture of the issues at stake in a rule-making." Id. at 530. *See also, Am. Med. Ass'n v. Reno,* 57 F. 3d 1129, 1132 (D. C. Cir. 1995) (notice is deemed defective if it does not "include sufficient detail on its content and basis in law and evidence to allow for meaningful and informed comment[.]"); *N. Carolina Growers' Ass'n. v. UFW, 701* F.3d 755 (4th Cir. 2012) (Court invalidated Department of Labor regulations because the agency failed to properly notice public comments); *Prometheus Radio Project v. FCC,* 652 F.3d 431, 450 (3d Cir. 2011) (Public notice and comment must be meaningful).

This is exactly what happened in the present case. Contrary to its published and duly-enacted regulatory requirements, DNREC allowed US Wind to submit documents addressing the most critical issues of the Project, such as mitigation and compensation for harms, monitoring of EMF and other risks, emergency response

measures and decommissioning of Project components, well after the public record closed. Notably, none of these critical issues had been addressed by US Wind in its application documents or hearing exhibits posted in the public record.

It was erroneous as a matter of law for DNREC to rely on documents submitted after the close of the public hearing and comment. *See Genesis Healthcare v. Del. Health Res. Bd.*, 2015 WL 1478188 (Del. Super. 2015) *20. The review on appeal must be confined to the record that was before the administrative agency *in the hearing record. Tenneco v. Dept. of Energy,* 475 F. Supp. 299, 307 (D. Del. 1979). (emphasis added).

In *City of Wilmington v, FOP Lodge 1,* 2016 WL 4059237, *9 (Del. Ch. 2016), the Delaware Court of Chancery reversed the Public Employment Relations Board affirmance of an Arbitrator decision that "improperly took judicial notice of information outside the record without providing the parties notice and an opportunity to respond, and no recognized exception excuses this error." "Being quasi-judicial in nature, administrative agency hearings must adhere to the fundamental principles of justice, such as due process." *Id a*t *5.

Similarly, the Delaware Supreme Court in *Pusey v. Delaware Alcoholic Bev. Comm'n.*, 596 A.2d 1367 (Del. 1991) reversed a liquor license issued by the Alcoholic Beverage Control Commission because the Commission denied protestors access to financial information of the liquor license applicant in the administrative

proceeding. The Court reasoned:

> … An administrative hearing is a quasi-judicial proceeding, in which the parties are entitled to due process … *An administrative agency may not conduct a hearing in which it withholds information from the parties* involved in that hearing…*and simultaneously use that information as a basis for its decision…"* (emphasis added) (citations omitted).

Id at 1369.

Ironically, in this case, the Secretary's decision declared that the process DNREC decided to use (handling all the permits jointly) was "to ensure transparency, and *to make sure the public was afforded the ability to provide meaningful comment on the* ***complete proposed project***." (A-70) (R-V1-5467). (emphasis added) However, the public clearly did not have access to the complete proposed Project, nor the hundreds of pages of substantive, additional materials from the Applicant until after the Secretary had issued his final permit approvals.

Further, the process left many members of the public uncertain as to what materials applied to the specific permits, respectively, and by what standard they were to be evaluated. As one commenter said: "…The maze of information posted by DNREC on its website- effectively a document dump on the pubic – has served as a *de facto* bar to ordinary members of the public providing specific, substantive comments on the information…This violates the spirit and intent of the required pubic comment process." (A-325) (R-V2-798). *See also* A-284 (R-V2-484).

Longstanding Delaware case law, common sense and basic principles of fundamental fairness dictate that this Court should find that DNREC violated Plaintiffs' due process rights and failed to comply with law, the Regulations and its own policy when it deprived the public of the opportunity to comment on matters of critical significance considered by the Secretary in determining whether to grant the permits.

III. THE SECRETARY'S DECISION IS UNLAWFUL BECAUSE IT RELIES ON MATERIALS NOT IN THE PUBLIC RECORD, AND THEREFORE IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, AND FURTHER, DOES NOT INCLUDE CONSIDERATION OF ALL RELEVANT FACTORS REQUIRED BY LAW AND REGULATION.

The standard of review for an appeal of a beach construction permit is whether the record contains substantial evidence that reasonably supports the Secretary's findings. 7 *Del. C.* § 6803(e). A threshold issue in this case is whether essential documents pertaining to mitigation,[19] decommissioning, monitoring,[20] emergency response and other critical facets of the proposed project which were submitted to the Secretary after the close of the public hearing and comment period are "evidence in the record" that supports the Secretary's findings. Appellants contend that the Secretary's decision to issue the beach construction permit is not "reasonably supported" by evidence in the record because the voluminous, substantive US Wind documents relied upon by the Secretary (almost exclusively) in reaching the decision to grant the permits were submitted *after* the close of public comment, thereby depriving the public of the opportunity to provide input.

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[19] Even this report, belatedly provided, following the close of the record failed to provide adequate mitigation provisions, and apparently the Secretary accepted as "mitigation" for harms specific to the beach and bay, proposed spending on various environmental projects and programs unrelated or only tangentially related to this Project. R-V1-5353-5369.

[20] That report contains no details nor specifications of required environmental monitoring, but rather states that such information will be provided at a future date.

A court reviewing an environmental permit order must determine whether there is evidence in the record to support the administrative decision. *Del. Solid Waste Auth. v. Del. Dep't. Nat. Res. Env. Control,* 250 A. 3d 94 (2021). The Court in that case reversed and remanded a decision of the Environmental Appeals Board to develop a record concerning the penalty that the Department assessed against the Authority for transporting solid waste without a permit.

The development of a complete record before the Secretary is essential to enabling a reviewing court to determine whether the Secretary's decision is supported by evidence in the record. *Id*. An agency must support its conclusion with demonstrable reasoning based on the facts in the record. *Sierra Club v. EPA,* 972 F.3d. 290, 298 (3d Cir. 2021) (emphasis added) "Our review must . . . be based on 'the administrative record [that was] already in existence' before the agency, not 'some new record made initially in the reviewing court' or 'post-hoc rationalizations' made after the disputed action." *Id (citing cases)*.

Applications are deemed "complete" at the time they proceed to public hearing. https://dnrec.delaware.gov/environmental-permitting/ Nothing in DNREC's permitting process allows the hearing officer to rely on additional project materials or substantive information provided by the applicant after the close of the hearing. "The Secretary relies on information submitted *with the permit application*, reviews of the application performed by DNREC's subject-matter experts, and

comments received from the public *during the permit process*." *Id.* (emphasis added).

Evidence that is not a part of the administrative record cannot be used by an administrative agency to support its decision nor is new, substantive information provided by the applicant after the public record is closed, a part of the hearing record. *Genesis Healthcare, supra.* The reviewing court is limited to considering the record that was before the administrative agency *in the hearing record*. *Id* (*citing Tenneco, supra.* (emphasis added).

An administrative decisionmaker must only rely on evidence *in the record* in deciding a permit application. "The grounds upon which an administrative order must be judged are those up upon which the *record discloses* that its action was based." *SEC v. Chenery Corp*., 318 U. S. 80, 87 (1943) (emphasis added) Judicial review of agency action is limited to the grounds that the agency relied upon when it took the action. *Michigan v. EPA,* 576 U.S. 743, 758 (2015). In *Department of Homeland Security v. Regents of Univ. of Cal.,* 591 U.S. 1,3 (2020), the Court rejected argument by the Secretary of Homeland Security that the Secretary could rely on additional information disclosed nine months after the public hearing to rescind regulations. *See also, Ballard v. Comm'r.,* 544 U.S. 540 (2005) (Tax court may not exclude from the record on appeal reports submitted by special trial master because no legislation authorized the concealment); *National Parks Conservation*

Assoc. v. EPA, 803 F.3d 151 (3d Cir. 2015) (Review of administrative record is to be confined to consideration of the decision of the agency and the evidence on which it is based).

In the recent decision *Greenwich Terminals, LLC v. DNREC,* 2025 WL 1098975 (Del. Super. 2025), this Court emphasizes the importance of a complete record before the Secretary in the permitting process. In *Greenwich* the Court remanded a decision of the Environmental Appeals Board because the Board failed to adequately explain its conclusions based on evidence in the record and questioned whether certain relevant information was even before the Secretary.

On appeal, the reviewing court may only consider the record that was before the administrative agency in the hearing record, and cannot support its decision with information provided by the applicant after the hearing record is closed. *Genesis Healthcare, supra.* An administrative agency may not consider information outside of the hearing record absent notice to the parties and an opportunity to respond. *City of Wilmington v, FOP Lodge 1, supra.*

The power to issue zoning decisions "is analogous to that of an administrative agency." *New Castle County Council v. BC Dev. Associates,* 567 A.2d 1271, 1275 (Del. 1989). Like an administrative agency decision, the reasons for a zoning decision must be included in the record of the public hearing. *Id* at 1276. An applicant for a special use zoning exception was held to have failed to present

evidence in a manner that was "susceptible of cross-examination and rebuttal by opponents and of appellate review by the courts" when it submitted a late traffic study that the reviewing board could not have considered. *Cingular Pa., LLC v Sussex County Bd. of Adjustment,* 2007 WL 152548, at *7 (Del. Super. 2007). The Court held Cingular's delayed submission of a Drive Study was inappropriate and the Board should not have considered the Study.

This Court held in *Cingular* that:

> An applicant for a special use exception bears the burden of presenting evidence in a manner that is "susceptible of cross-examination and rebuttal by opponents and of appellate review by the courts." *Rollins Broadcasting of Delaware, Inc. v. Hollingsworth*, 248 A.2d143, 145 (Del. 1968). *Ex post facto* attempts to present evidence outside of the public hearing challenge those fundamental principles. Furthermore, the "voice of the community is an important element to public hearings." *Bethany Beach Volunteer Fire Co. v. Bd. Of Adjustment of Bethany Beach*, 1998 Del. Super. LEXIS 330, at *6 (Del. Super. Sept. 18,1998). An offer of evidence outside of the public hearing compromises the community's ability to challenge a party's zoning application. *See Beatty v. New Castle County Bd. Of Adjustment*, 2000 Del. Super. LEXIS 235, at *18 (Del. Super. May 23, 2000) ("It is extremely important that the community's participation in this process be meaningful with a full opportunity to be heard."). Cingular's delayed submission of the Drive Study was inappropriate, and the Board could not have considered the Study.

2007 WL 152548, at *7.

In *Rollins, supra,* the Delaware Supreme Court affirmed the Superior Court's decision to strike down a decision by the New Castle County Board of Adjustment ("Board"). The Supreme Court found that the hearing before the Board contained

little substance (the Court cited a "sparse" application, unsigned "Report" and a general explanation of community antenna systems) and that the Board failed to consider the grounds that would permit the finding of an exception. "We are unable to find in the record of this case any evidence addressed to the grounds explicitly stated in the Zoning Code as the bases for an exception." *Id* at 145. In *Rollins*, as in this one, additional information was submitted to the Board after the hearing. The Court found that, "[f]rom the Board's detailed decision, it is manifest in the instant case…that the members of the Board of Adjustment relied upon facts known to them personally", and that the evidence presented was not "sufficient to fulfill the requirement that the factual grounds necessary for an exception to the Zoning Code be established by evidence of record, susceptible of cross-examination, rebuttal and judicial review." *Id.* at 146.

Similarly, in *Zoning Board of Adjustment of New Castle County v. Dragon Run Terrace, Inc.,* 222 A.2d 315 (Del. 1966), the Supreme Court noted:

> The only evidence on the point in the record before us is that which was presented in December 1961; it tends to show the existence of a need rather than its nonexistence. The record includes some reference to certain trailer parks then existing, and the members of the Board undoubtedly had some personal knowledge of their number and size; the difficulty is that this information is not disclosed in the record. In short, the record by which we must judge the case completely fails to justify any finding of lack of need. It is manifest from questions asked by members of the Board at the hearing that, in considering various aspects of this case, they were relying upon facts known to them personally but not made a matter of record by proper evidence. *Our various administrative and quasi-judicial bodies should understand that*

> *any pertinent information* known personally by the members, but *not placed into the record by proper evidence, cannot be considered by a court on appellate review. See Fitzsimmons v. McCorkle*, Del., 214 A.2d 334; 2 Am.Jur.2d 623. This requirement applies to zoning matters, 2 Rathkopf on Zoning and Planning (3rd Ed.) 64-67.

Dragon Run 222 A.2d at 318.

In the instant case, the Secretary's decision to issue the beach construction permit is supported virtually exclusively by documents which were submitted by US Wind after the close of public comment. These critical documents, which were never made part of the public record, included information about monitoring, decommissioning, emergency response and construction plans.

This Court may not consider this information when making a determination if the Secretary's decision is reasonably supported by substantial evidence because it was never made a part of the public record for the Project. *See Pusey, supra., Genesis, supra* at *20; *City of Wilmington v, FOP Lodge 1, supra; Delmarva Power & Light Co. v. Tulou,* 729 A.2d 868 (Del. Super. 1998). As the Superior Court in *Tulou* determined, in striking a proposed regulation because underlying documents were not provided in the record, "DNREC has failed to provide sufficient fact-finding and analysis of evidence to permit this Court to conclude there is a reasonable basis on the record for its decision." *Id at* 872 *See also* A-56, 64-65 (R-V1-13, 21-22). In the public hearing in this case, and consistent with the DNREC published policies, the Hearing Officer, in describing what would constitute the

record in this case to participants, identified the record only as consisting of documents on the DNREC project webpage; the transcript of the hearing, public comments submitted in writing and exhibits. The record lacks substantial evidence to reasonably support the Secretary's decision.

A further reason the Decision, as issued, is invalid is that the Secretary failed to consider and weigh the factors required by the Regulations. 7 DE Admin C. 5301, §5.3.1 requires that DNREC "shall", whenever the Division is deciding to issue a Permit pursuant to the Regulations, take into consideration any relevant information relating to the following:

> 5.3.1.1 Any comments received by the Division;
>
> 5.3.1.2 The effect of the proposed construction on shoreline recession, beach erosion, flooding, and potential damage to the parcel of real property that is the subject of the permit application, and potential damage to any other parcel of real property, public lands, or personal property;
>
> 5.3.1.3 The feasibility of alternative protection from storm damage that may be available;
>
> 5.3.1.4 The historical average rate of shoreline change for the general area nearby and including the parcel of real property that is the subject of the permit application;
>
> 5.3.1.5 The design modifications which may mitigate the impact of the proposed construction on the part of the beach that is located seaward of the Building Line (see subsection 5.3.2 below for further information); and
>
> 5.3.1.6 Any other factors or information that the Division determines to be relevant to the subject matter of the permit and carrying out the purposes and intent of the Regulations and the Act.

The Secretary's decision failed to consider, or even acknowledge, the above-

cited, required §5.3.1 regulatory factors, including the effect of the proposed construction (which included significant dredging) on shoreline recession, beach erosion, flooding, and potential damage to the public beach, and other parcels of real property, public lands, or the historical rate of shoreline change for the subject parcel and nearby parcels. 7 Del. Admin. Code Ch. 5102 §§ 5.3.1.2; 5.3.1.4

Further, the application did not propose, and the Department did not consider, suitable design modifications which might mitigate the impact of the proposed construction on the public beach that is located seaward of the Building Line. Pursuant to 7 *Del. Admin. Code* 5102 §5.3.2. DNREC is required to "balance the actual and potential hardships or benefits that may be experienced by the person owning the structure or portion thereof against the actual and potential hardships or benefits that the State, the public and adjacent landowners may experience." The Secretary's decision did not adequately address the required criteria. DNREC must balance the following factors, as well as the geology, geomorphology, meteorology and hydraulics of the area. *Id.*[21]

The Secretary did not have before him in the record, and US Wind acknowledges it has not provided, vital studies on the impact of this Project on key marine species and other wildlife, some of which find unique sanctuary in and

21 Nor did the Hearing Officer's report or Technical Response Memoranda address these specific regulatory criteria.

around Delaware's coastal waters, such as horseshoe crabs, endangered, recreational fish populations, migratory birds and bats.[22]

The Secretary's approval of the permit additionally constitutes an error of law as it requires inadequate and unspecified bonding "or similar mechanism", at an unknown future date, including for decommissioning and removal of the Project components. In addition, the only information supplied regarding bonding at all was provided by US Wind after the public comment period closed and the public never had an opportunity to review or comment on the adequacy of such provisions.

The Secretary's decision is not supported by substantial evidence regarding the adequacy of the Monitoring Plan, which fails to contain any details or specifications of required environmental monitoring, but rather states that such information will be provided at a future date. (A-207) (R-V1-5334).

Again, *Rollins* is instructive. In affirming the reversal of the decision to grant a zoning exception, the Delaware Supreme Court stated, "[w]e are unable to find in the record of this case any evidence addressed to the grounds explicitly stated in the Zoning Code as the bases for an exception…" *Rollins* at 145.

DNREC failed to disclose to the public, and deprived the public of a meaningful opportunity to review and comment on, hundreds of pages of substantive

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22 See R-V1-446 "The effects of EMF on most invertebrate taxa…horseshoe crabs, etc., remain largely understudied."

documents, relied upon by DNREC in issuing the beach construction permit, that were submitted by US Wind outside of the administrative record. Further, DNREC did not provide an analysis of the criteria required in its own regulations to issue the beach construction permit. Therefore, the record before this Court does not contain substantial evidence that reasonably supports the Secretary's findings as required by 7 *Del. C.* § 6803(e). Accordingly, the Court should reverse the Secretary's decision.

IV. THE SECRETARY ABUSED HIS DISCRETION AND ERRED AS A MATTER OF LAW BY ADOPTING AN ERRONEROUS FINDNG, WITHOUT FURTHER INQUIRY, THAT THE DELAWARE COASTAL ZONE ACT WAS INAPPLICABLE TO THIS PROJECT, WHICH PROPOSES ACTIVITY CLEARLY OF AN INDUSTRIAL NATURE, INCLUDING MILES OF DRILLING AND PLACEMENT OF PIPELINES FOR CONDUCTING ULTRA-HIGH VOLTAGE ELECTRICITY THROUGHOUT THE COASTAL ZONE.

It is undisputed that the *entirety* of Delaware portion of the US Wind Project – including the coastal construction (drilling and laying pipelines through the ocean and under 3Rs beach) at issue here-- lies within the area designated as the Delaware Coastal Zone – which encompasses all of Delaware's shoreline and bay areas. 7 *Del.C.* §7002(i). (*See* R-V1-2414).

The Coastal Zone Act (CZA) was enacted in 1971, to "control the location, extent and type of ***industrial development*** in Delaware's coastal areas." 7 *Del.C.* §7001 (emphasis added) As DNREC itself states: "[t]he Act is designed to protect the coastal areas from the impacts of heavy industrialization and bulk product transfer *and safeguard their use primarily for recreation and tourism*."[23] (emphasis added) It is well settled that statutes enacted for the purpose of environmental protection should be "liberally construed" for the protection of the State and its inhabitants. *See Delaware Solid Waste Auth.*, *supra,* 250 A.3d 94, 109–10 (Del. 2021). In *City of Wilmington v. Parcel of Land*, 607 A.2d 1163, 1166-67 (Del.

23 https://dnrec.delaware.gov/coastal-zone-act/history/

1992), the Delaware Supreme Court specifically held that the Coastal Zone Act should be "liberally construed in order to fully achieve the legislative goal of environmental protection," and rejected a literal or "pinched" construction of terms, such as "manufacturing," in the CZA.

Per 7 *Del.C.* §7001, the Act addresses ***all*** "industrial" development in the Coastal Zone[24] – with some activities being banned entirely; some requiring a permit; and some being exempt from permitting requirements. This distinction necessarily involves an examination of each proposed activity. In 1999, DNREC enacted regulations for the purpose of implementing the CZA. *See Regulations Governing Delaware's Coastal Zone,* 7 DE Admin. C. 101. These Regulations include an administrative determination that certain activities do not fall with the meaning of "heavy industry" or "manufacturing uses," under the CZA. 7 DE Admin C. 101, §5.1. However, this regulation does not (and could not under the language of 7 *Del.C.* §7001) confer a status of "by right" or "automatically permitted" as to as to any given industrial activity within the coastal zone. The CZA regulates

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24 For example, the Delaware Coastal Zone Act specifically *prohibits* "bulk product transfer facilities" in the Coastal Zone. Thus, if any activity described in 7 DE Admin. C. 101 §5.1 potentially constituted a bulk transfer facility it would not be permitted, or at least would have to undergo a status decision or permit review to determine if it met the bulk transfer criteria and/or was grandfathered. *See e.g.* 7 *Del.C.* §7003(a); 7 Admin C. 101, §§5.1.9-5.1.11.

"industrial development"[25], and such activity may extend beyond the definitions of "heavy industry" or "manufacturing" types of uses. Indeed, this Court has held that "[w]ith respect to industrial development, other than heavy industry [which is barred], *the CZA requires a permit for such development*." *Nichols v. State Coastal Zone Ind. Cont. Board*, 2013 WL 1092205, *2 (Del. Super. 2013); *Kreshtool v. Delmarva Power,* 310 A.2d 649, 651 (Del. Super. 1973) ("the statute . . . requires *all new industry* seeking development within the coastal zone to obtain a permit.") (emphasis added).

The Act itself creates *no* "by right" industrial activities in the coastal zone. This is further supported by the regulatory establishment of the "status decision" process, which provides that "*any person wishing to initiate a new activity* . . . may request a status decision *to determine whether* or not the activity requires a permit, is exempt from permitting, or is prohibited." 7 DE Admin C. 101 §7.1 (emphasis added) The processing of a status decision is a distinct procedural mechanism, that requires legal notice to the public, and an opportunity for public input and comment, specifically as to the CZA. In addition, the Secretary may "*if there is cause to suspect an activity . . . is prohibited or should receive a permit*," request the entity proposing to engage in that activity "to apply for a status decision." *Id*, §7.4

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25 7 *Del.C.* §7001.The term "industrial development" is not defined within the CZA or by regulation.

(emphasis added).

Despite the clearly industrial nature and scale of this massive undertaking to drill and dredge through miles of the Delaware coastal zone, through the ocean, beaches and bays, it is undisputed that no status decision proceeding took place here. US Wind never filed a Request for Status Determination or a Coastal Zone Permit application, and neither DNREC or the Secretary affirmatively raised the issue of CZA compliance at any time during the multi-permit application process. No documents in the public record during the multi-permit proceeding addressed or related to compliance with (or even potential exemption from) the Coastal Zone Act.[26] The issue of the Coastal Zone Act's applicability to this Project was, however, specifically raised to DNREC by several Plaintiffs and commenters during the public comment period. (*See e.g.* R-V1-109; R-V2-46-47; 53; 73; 268-269; 334-337; 485-86).

Disregarding the clearly industrial nature and scope of this Project, located within the natural resources of Delaware's ocean, beach and bay[27], the Secretary

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26 Please note that a separate Federal issue, "consistency" with the *federal* Coastal Zone Management Act (CZMA), is referenced in some of the US Wind documentation (*see e.g.* R-V1-2112; 2414). This federal law (CZMA) is unrelated to the Delaware Coastal Zone Act (CZA).

27 The CZA's "Purpose" statute explains that "protection of the environment, natural beauty and recreation potential" of the Coastal Zone is "of great concern," and "[t]herefore control of industrial development in the coastal zone of Delaware through a permit system at the state level is called for." 7 *Del.C.* §7001.

arbitrarily and capriciously chose to disregard the potential applicability of the CZA. Rather, the Secretary (or more accurately DNREC staff) simply decided *pro forma (*R-V1-4928), and during a different (non-CZA) permitting process, that the US Wind Project was exempt from CZA applicability.

The Secretary, in his December 9, 2024 final Order, based his conclusions and approvals entirely upon the Hearing Officer's Report ("Vest Report", dated November 25, 2024, which was not released to the public until December 9, 2024, simultaneous with the Secretary's Order). *See* A-72, 91-115 (R-V1-5469; R-V1-4887-4911). The Vest Report itself incorporated by reference various subordinate division reports and "Technical Response Memoranda", as well as hundreds of pages of appendices and relevant documents submitted by US Wind well after the public record had closed.

One of these Appendices, addressing the Coastal Construction permit on appeal here, was a "Technical Response Memorandum" from Jennifer Pongratz of the Division of Watershed Stewardship, to Hearing Officer Lisa Vest. (A-130) (R-V1-4926), undated, within Appendix A to Vest Report). This document, adopted by the Hearing Officer, and thereafter (by reference) the Secretary, contains a single reference to the CZA, and states as follows:

Coastal Zone Act

US Wind's project is exempt from the Coastal Zone Regulations/Permit

> requirements. Specifically, 7 DE Admin. Code 101, Section 5, Uses Not Regulated, Subsection 5.1.5, confirms that "[f]acilities used in transmitting, distributing transforming, switching and otherwise transporting and converting electrical energy" are not regulated under the Coastal Zone Act Regulations.

(A-132) (R-V1-4928).

Here, DNREC Division[28] staff concluded that the proposed US Wind activity fell within Regulation §5.1.5: "facilities used in transmitting, distributing, transforming, switching, and otherwise transporting and converting electrical energy." However, even assuming *arguendo*, this was an accurate characterization of the activity (which here involves far more than transmission, such as miles of drilling, dredging, and burying pipelines), this does not necessarily insulate the Project from Coastal Zone Act review. Indeed, an administrative regulation would have no authority to entirely shield a class of industrial activities from any review under the Act, as this would exceed the scope and intent of the enabling statute, which is "control of *industrial* development in the coastal zone. . . ." 7 *Del.C.* §7001, *supra* (emphasis added).

Additionally, DNREC was perhaps too quick to end its analysis of the

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28 Notably, it is a different Division of DNREC – the Division of Climate, Coastal and Energy – which regulates coastal zone activity and administers the CZA – not the Division of Watershed Stewardship, which made the "exemption" pronouncement in its TRM below. (A-132)(R-V1-4928). The Secretary himself did not opine on, or explicitly adopt, the Watershed Division's finding as to the CZA.

proposed project by concluding that the proposed activity was simply a Reg. §5.1.5 "facility" for "transporting" electrical energy. The very purpose of the US Wind Project is the *generation* of megawatts of new electrical power. Notably, the Regulations carve out a specific exception for "facilities used to generate electric power directly from ***solar*** energy." §5.1.6 (emphasis added) However, the regulations *do not similarly exempt* facilities which generate electricity from offshore *wind* energy (or other non-solar sources)[29]. *See Leatherbury v. Greenspun*, 939 A.2d 1284, 1291 (Del. 2007) ("where a form of conduct . . .and things to which it refers are affirmatively or negatively designated, there is an inference that all omissions were intended by the legislature").

Perhaps a logical difference justifying this distinction would be the extensive drilling and pipeline infrastructure which must be placed in the coastal zone to facilitate and support offshore wind generation – a factor which does not exist with solar facilities. Whatever the reason, it is clear that the Coastal Zone regulations could have, but did not, specifically exempt wind generation facilities from permitting under the Act.

It should also be noted that industrial activities involving pipelines and drilling

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29 *See also Kreshtool v. Delmarva Power, supra* (electric generating unit subject to CZA permit) *Nichols, supra,* ("Bloom Box" electrical generation facilities subject to CZA permit).

are particularly of concern under the CZA. The Delaware portion of the US Wind Project operates primarily through drilled and buried pipelines holding ultrahigh-power cables, traversing the ocean floor, and from there, buried under the 3Rs public beach and under and through the inland bays and public wetlands. CZA Regulation 4.8 defines as prohibited "heavy industry," "[i]ndividual pipelines or sets of pipelines which are not associated with a use that obtains a permit but which meet the definition of bulk product transfer facilities."

"Bulk product transfer facility" [BTF] is defined in relevant part as "any port . . . attached to shore by any means, for the transfer of bulk quantities *of any substance* from vessel to onshore facility or vice versa." 7 *Del.C.* §7002(b) (emphasis added) BTF's are, like "heavy industry", absolutely prohibited in the coastal zone. 7 *Del.C.* §7003(a). Neither the Secretary nor the Hearing Officer made any findings as to whether the US Wind pipelines could be considered a BTF.

As to drilling, the Act provides that "offshore drilling for oil and natural gas shall be prohibited in the coastal zone and any other state waters and no permit may be issued for or in connection with the development or operation of any facility or infrastructure associated with offshore drilling for oil or natural gas." While the Project is not related to offshore drilling for "oil or natural gas," it indisputably involves similar drilling activity on a massive scale – specifically involving the use of heavy machinery for sub-marine, subterranean and sub-wetland drilling into the

seabed and the placement of miles of cable pipelines, including under a public beach. It is hard to envision a coastal disturbance more "industrial" in nature than this. Accordingly, the Secretary should have required, at a minimum, that a status determination as to the need for a Coastal Zone Permit take place, when the entire impacted by the drilling and laying of miles of pipeline for the proposed US Wind Project (in Delaware) lies within the Delaware Coastal Zone (7 *Del. C*. §7002(i)).

The Division's conclusion, and its subsequent incorporation into the Hearing Officer's and Secretary's decision, is both arbitrary and an error of law. While it relies on subsection 5.1.5 in the Regulations, which decrees that certain transmission facilities and activities are (administratively) not deemed to constitute "*heavy industry" or "manufacturing"* uses, it cannot be concluded from this provision, as DNREC ultimately did, that a clearly industrial-scale energy project involving substantial disturbance and modification of the protected lands of the coastal zone, such as the this one, is not "regulated," and should not even be evaluated as *industrial* activity via a status decision proceeding under the Coastal Zone Act.

The Delaware Supreme Court has repeatedly urged a flexible and expansive view of the scope of the Coastal Zone Act.[30] *See Coastal Barge Corp. v. Coastal*

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30 In *Coastal Barge Corp.,* the Supreme Court rejected a "literal meaning" of "bulk product transfer facility" where the actual proposed activity clearly implicated the overall purpose of the Coastal Zone Act. "[T]o give §7002(f) [BTF definition] a literal interpretation would lead to such unreasonable or absurd consequences in

Zone Indus. Control Bd., 492 A.2d 1242, 1246-47 (Del. 1985). *See also Kreshtool, supra*, holding that the statute defines "heavy industry" not only by its physical characteristics "but also in terms of its potential ability to pollute in the event of equipment failure or human error." 310 A.2d at 652; *City of Wilmington, supra,* 607 A.2d at 1166 (CZA is "designed to regulate closely the types of uses permitted and carried on in [the Coastal Zone]"). DNREC's regulatory definition of "Potential to Pollute" appears to clearly subsume the proposed US Wind activity of drilling, laying pipelines, and transporting billions of volts of electricity[31]:

> "**Potential to Pollute**" means the potential to cause pollution or short and long term adverse impacts on human populations, air and water quality, wetlands, flora and fauna, or to produce dangerous or onerous levels of glare, heat, noise, vibration, radiation, electromagnetic interference and obnoxious odors. The Department will consider mitigating controls and risk management analysis reports from the applicant in evaluating a proposed use's potential to pollute. The Department shall consider probability of equipment failure or human error, and the existence of backup controls if such failure or error does occur, in evaluating an applicant's potential to pollute.

7 DE Admin. C. 101, §3.0. (emphasis added) Another relevant consideration is the effect that the proposed industrial activity will have upon "recreation and tourism" in the Coastal Zone. *See Sierra Club v. Tidewater Environmental Services, Inc.,* 2011WL 5822636, *13 (Del. Super. 2011).

DNREC and the Secretary considered none of these factors – merely writing

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light of the expressed statutory purpose in §7001 that we are compelled to conclude the statute is ambiguous. 492 A.2d at 1246; *see also* at 1247-48.

31 US Wind's own "Monitoring Plan," submitted well after the public record was closed and relied on by the Secretary, contains monitoring provisions for monitoring "Electromagnetic Field[s]." (R-V1-5361-5362).

off the Project as "not regulated" by the CZA in a single sentence in a TRM. (A-132) (R-V1-4928). Separate and apart from other errors in the processing and granting of the Coastal Construction and other Title 7 permits, this matter should be reversed due to the Secretary's failure to adequately consider and follow the provisions of the Delaware Coastal Zone Act.

CONCLUSION

For the reasons set forth herein, Appellants respectfully request this Court to reverse the Decision of the Secretary, dated December 9, 2024, which granted the coastal construction permit.

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