Supreme Court Defines Standing Under Coastal Zone Act

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The Delaware Supreme Court's recent ruling in *Nichols v. State Coastal Zone Industrial Control Board*, No. 190, has cleared the path for the development and operation of the Red Lion Energy Center, located in Delaware's Coastal Zone. More broadly, the decision could facilitate the growth of similar projects by reducing the chances of a successful appeal by Delaware residents following the grant of a Coastal Zone industrial permit application by the state Coastal Zone Industrial Control Board.

Relying on its holding in *Oceanport Industries v. Wilmington Stevedores*, 636 A.2d 892 (Del. 1994), the court for the first time defined the term "aggrieved" under Title 7, Section 7007(b) of the Coastal Zone Act (CZA) and concluded that petitioner John A. Nichols lacked standing because he failed to establish that he was an aggrieved person under the act.

In November 2011, Diamond State Generation Partners LLC submitted an application for a CZA permit to construct and operate the Red Lion Energy Center within the Coastal Zone of Delaware. The facility would use fuel cell technology, known as "Bloom boxes," to generate electricity from natural gas through a chemical process. The secretary of the Delaware Department of Natural Resources and Environmental Control (DNREC) issued an environmental assessment report finding the application to be administratively complete and stated many benefits of the projects, including the lack of any hazardous waste.

In March 2012, the DNREC hosted a public hearing to receive comments on the permit. Nichols appeared and raised several objections. The hearing officer recommended granting the CZA permit over Nichols' objections, and the secretary issued the permit. Nichols appealed the issuance of the permit. Diamond State and the DNREC responded by moving to dismiss Nichols' appeal on the grounds that he lacked standing. Specifically, they argued that Nichols failed to establish that he was an "aggrieved" person as required by Section 7007(b). In response, Nichols argued that he was acting on behalf of "nesting birds and other flora and fauna, which were unable to file an appeal" and that his interest was "the public interest in a thorough, fact-based administrative determination before a Coastal Zone permit is issued."

The Coastal Zone Industrial Control Board hosted a hearing to address the appeal. The board voted to dismiss Nichols' appeal for lack of standing. In the board's final opinion and order granting Diamond State and DNREC's

motion, it reasoned that Nichols had "not identified or presented any evidence relating to any legally protected interest that he possesses that has been or will be invaded upon by the permit issued to Diamond State." The Superior Court affirmed the decision of the board. Nichols appealed, again.

The Supreme Court acknowledged that any right Nichols has must be derived from Title 7, Section 7007(b), which provides that "any person aggrieved by a final decision of the secretary of [DNREC] under § 7005(a) of this title may appeal same under this section." All parties agreed that the term "aggrieved" is not defined by the CZA, nor had it ever been construed by the court.

To interpret the term, the Supreme Court looked to its decision in *Oceanport Industries*. That case centered on whether certain organizations had standing to contest the issuance of permits for other activities, including pier improvements and point source discharge into the Delaware River, to the Environmental Appeals Board. The language at issue in *Oceanport Industries* came from Title 7, Sections 6008(a) and 7210, which reads: "Any person whose interest is substantially affected by any action of the secretary ... may appeal to the" EAB.

The court applied the definition used by the U.S. Supreme Court in *Association of Data Processing Service Organizations v. Camp*, 397 US 150 (1970), to define the term "substantially affected." Under *Data Processing*, standing is conferred where there is "(1) a claim of injury in fact; and (2) the interest sought to be protected is arguably within the zone of interest to be protected or regulated by the statute." Although *Oceanport* did not specifically address the phrase "any person aggrieved," the court reasoned that the rationale for applying the *Data Processing* test was equally applicable to Nichols' appeal. Under *Data Processing*, Nichols was required to demonstrate an injury in fact, and further show that such injury was within the zone of interest sought to be protected by the statute.

The record revealed that Nichols lives 14 miles from the property affected by the permit. Nichols provided no testimony at the hearing before the board as to how the facility would impact his legal rights. Instead, he merely claimed on appeal that he is directly affected by the "probable air and water pollution likely to be generated by the proposed facility" and the negative aesthetic effect on the Coastal Zone. Because Nichols could not show that issuance of the permit to Diamond State would cause injury to a legally-protected interest, the court concluded that he failed to establish that he was an aggrieved person under the CZA. Accordingly, he lacked standing.

So, the question remains: What must Delaware residents, such as Nichols, establish to be considered an "aggrieved" person under the act? Notably, the court did not hold that Nichols' claims of aesthetic and environmental degradation are insufficient to constitute an injury in fact. As the U.S. Supreme Court held, two years after *Data Processing*, in *Sierra Club v. Morton*, 405 U.S. 727 (1972), "We do not question that this type of harm may amount to an 'injury in fact' sufficient to lay the basis for standing. ... Aesthetic and environmental well-being, like economic well-being, are important ingredients to the quality of life in our society." In fact, the CZA, at Section 7001, provides: "The coastal areas of Delaware are the most critical areas for the future of the state in terms of the quality of life in the state." Moreover, the interest sought to be protected — i.e., Delaware's fragile coastal ecosystem — is certainly within the zone of interest to be protected or regulated by the CZA.

What, then, was Nichols missing? Not much, it seems. He simply needed to allege that the issuance of the permit and construction of the facility would have a negative impact on his interest in the coastal area to be developed. In other words, it would seem sufficient for standing purposes for Nichols to claim the facility would adversely affect the scenery, nature and wildlife of the coastal area and would impair his use or enjoyment of it. This assumes, of course, that Nichols had some connection to the specific coastal area at issue. Thus, while the court's decision in *Nichols* appears to require a heightened interest for appeals under Section 7007(b), on closer inspection, it merely restates the longstanding requirement of showing that the challenged action has caused the appellant an injury in fact.

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