

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CAESAR RODNEY INSTITUTE, PAUL :  
“WES” TOWNSEND and GEORGE :  
MERRICK, :  
 : C.A. No.  
 :  
 *Plaintiffs,* :  
 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, :  
 :  
 *Defendants.* :

**COMPLAINT FOR WRIT OF PROHIBITION**  
**AND DECLARATORY JUDGMENT**

Plaintiffs Caesar Rodney Institute (“CRI”), Paul “Wes” Townsend (“Townsend”) and George Merrick (“Merrick”), (together, “Plaintiffs”), by and through their undersigned counsel, hereby bring this action seeking a Writ of Prohibition and for declaratory judgment against Defendants, The Honorable Shawn M. Garvin (“Garvin”, “Secretary”), in his official capacity as the Secretary of the Department of Natural Resources and Environmental Control, and the State of Delaware Department of Natural Resources and Environmental Control (“DNREC”), (together, “Defendants”), alleging as follows:

1. The Maryland legislature passed laws that would advance the utilization of offshore wind turbines for the generation of electric power for the State of Maryland. Maryland entered into an agreement to purchase power from US Wind, Inc. (US Wind), a company which procured a federal lease for the purpose of constructing an offshore wind project to provide electricity. US Wind is currently seeking federal, state and local approvals for the project, titled “Maryland Project” by US Wind.

2. US Wind proposes to bring the electricity generated by the 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.

3. The Governor of Delaware, John Carney, entered into an agreement of terms (“Term Sheet”) on December 19, 2023, that would allow the transmission lines from the Maryland Project to make landfall in and under the lands of the Delaware Seashore State Park, in the Delaware State Park public beach and fishing area, located on the coast of Sussex County, at 3Rs Road.

4. US Wind included several options in their federal application, all in Delaware, for transmitting the electricity generated by the turbines to a proposed substation, to be located on a parcel on the Indian River Bay, purchased by Renewable Redevelopment, LLC, a subsidiary of US Wind.

5. It appears, however, that US Wind has chosen a preferred route, which would involve horizontally drilling under the 3Rs public beach, under Route 1, and under the wetlands and the inland bay, known as the Indian River Bay, to the said parcel.

6. To allow the transmission as preferred, US Wind applied for permits from DNREC, including permits specific to coastal construction/beach preservation, the use of subaqueous lands, and the use of wetlands.

7. While each permit is governed by specific regulatory criteria, DNREC decided to consider all permits in one “joint” application process and provided notice for a joint public information session.

8. On July 9, 2024, DNREC held a joint, “virtual” public hearing on all of the aforesaid applications for permits and then continued a public comment period, again relating to all three of the permits, to expire on September 9, 2024.

9. That public comment period has expired by the terms announced by DNREC.

10. DNREC has indicated that the Secretary will make determinations as to whether to grant or deny each of the permits following the close of the public comment period.

11. Plaintiffs and others did submit comment to DNREC during the public comment period raising the issues addressed herein and others.

12. Counsel sent a letter to Defendant Garvin on August 15, 2024, before the public comment period expired, alerting Garvin and DNREC that the applications for permits were incomplete and requesting the agency to voluntarily cease processing of the permit applications until such time as they were, respectively, complete.

13. Counsel received no response to the letter, and, as said, the public comment period expired.

14. To effectuate the Maryland Project, US Wind was also required to apply to Sussex County for a conditional use of the aforesaid parcel for construction of a substation, which would receive and distribute the electricity generated by the offshore turbines. This zoning approval would be required regardless of the route by which the electric transmission lines arrived at the substation.

15. Renewable Redevelopment, LLC did apply to Sussex County for conditional use zoning and a hearing was held before the Sussex County Council on July 30, 2024.

16. Following the hearing, the Council closed the record and took the matter under consideration. A decision on the zoning application is pending.

### **Jurisdiction and Venue**

17. This Court has subject-matter jurisdiction under 10 *Del. C.* § 562 because Plaintiffs seek relief in the form of a writ of prohibition. *See also Knight v.*

*Haley*, 176 A.461 (Del. Super. 1934), *Family Court v. Department of Labor and Industrial Relations*, 320 A.2d 777 (Del. Ch. 1974).

18. This Court has jurisdiction and the “full power and authority to...examine [and] correct the omissions [and] neglects of all...officers within the State”, under 10 *Del. C.* § 542.

19. Venue is proper in this Court and the Court has personal jurisdiction over Defendants because Secretary Garvin is a State of Delaware official, and the Department of Natural Resources and Environmental Control is a State agency.

### **Parties**

20. Plaintiff Townsend has lived on, recreated in, and derived his livelihood from the Indian River Bay for his entire life. His family has done so for nearly two centuries. He is a commercial fisherman who retrieves his bait for ocean fishing from the Bay, largely with gill netting. His ability to sustain his livelihood will be substantially and detrimentally affected by the installation and presence of high-powered transmission lines and the risks they pose to his ability to continue to fish and retrieve bait in the ocean and bay areas.

21. Townsend is completely invested in commercial fishing, and therefore is familiar with the impact the installation and presence of high voltage transmission lines have on the environment and the risks they pose to the ocean and bay areas. He is Chairman of the Mid Atlantic Fishing Management Council (one of eight federal

fishing councils), and is a member of or serves on: the Tidal Finfish Advisory Council for the State of Delaware; the Large Whale Reduction Team; Responsible Offshore Science Alliance, and the Responsible Offshore Development Alliance.

22. Plaintiff Merrick is a commercial clammer for whom the integrity, safety and stability of the seabed in the Indian River Bay is paramount. His livelihood depends on the Bay. He, and others in his business, have been prohibited by DNREC from power dredging to harvest clams because DNREC has recognized that power dredging would destroy the natural ecosystem of the Bay. Merrick also has a back bay charter business that will suffer significantly from the construction and operation of the transmission lines going through the bay bed. He runs daily charters in season that take hundreds of people, both residents and tourists, to clam, fish, and learn about the Bay and its beauty. Both businesses will be substantially and adversely affected by the installation and presence of the proposed high voltage transmission lines.

23. Plaintiff CRI is a 501(c)(3) organization that advocates for sound and sensible governmental policies, including those regarding energy, education and the environment. The Director of CRI's Energy and Environment Division is David Stevenson ("Stevenson"), a Delaware resident who is a nationally recognized expert on energy, onshore and offshore wind and solar, as well as utility pricing and supply issues. Stevenson has been accepted as an expert witness by the Delaware Public

Service Commission, individually and as a paid consultant for the Delaware Public Advocate. He and CRI have taken a position opposing this proposed project for many reasons, including its impact on the environment and Delaware's natural resources; the unreliable and intermittent availability of electricity from offshore wind turbines; the significant cost to users of electricity generated by this project; and the cost to Delaware's valued treasure of the ocean and bay, as well as associated tourism. Townsend and Merrick are members of CRI.

24. An organization has standing to sue on behalf of its members if “(1) the interests to be protected are germane to the organization’s purpose; (2) neither the claim asserted nor the relief sought requires the participation of individual members; and (3) the organization’s members would otherwise have standing,” *Del. State Sportsmen’s Ass’n v. Garvin*, 196 A.3d 1254, 1263 (Del. 2018); citing *Oceanport v. Wilmington Stevedores*, 636 A.2d 892 (Del. 1994). Here, CRI seeks to protect its members’ interest in the environment, commerce and energy, which are germane to the core purposes of the organization. The participation of individual members is not necessarily required because the claims relate to the failure of DNREC to follow statutes and regulations. However, individual members do have standing and are co-plaintiffs to this litigation.

25. Defendant Garvin is the Secretary of the Delaware Department of Natural Resources and Environmental Control. Secretary Garvin’s duties include

the obligation to “adopt . . . rules or regulations . . . to effectuate the policy and purposes of this chapter. No such rule or regulation shall extend, modify or conflict with any law of this State or the reasonable implications thereof.” 7 *Del. C.* § 6010<sup>1</sup>. The Secretary has the responsibility to sign all orders granting permits for projects, grants and other action taken by the agency. *See* 7 *Del. C.* § 6003(a).

26. Defendant DNREC is a state administrative agency which consists of several Divisions, each with responsibilities and expertise for differing areas of environmental science. Specifically, Division staff is responsible for the evaluation of applications for permits and to make recommendations or reports to superiors and the Secretary.

27. Defendants, together and with those under their control and supervision, are responsible for the administration and enforcement of Delaware’s environmental laws and regulations, including 7 Delaware Code Chapters 68, 72, and 75, and determining which operations and conduct by individuals and businesses throughout the state should be permitted, and under what terms.

### **COUNT 1 -- WETLANDS PERMIT APPLICATION**

28. 7 Delaware Code, Chapter 66 governs and regulates activity affecting the State’s wetlands. 7 *Del. C.* § 6604 provides that “[a]ny activity in the wetlands requires a permit from the Department except the activity or activities exempted by

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<sup>1</sup> *See also* 7 *Del. C.* §§ 6601 (Wetlands); 6803 (Beach Preservation); 7201 (Subaqueous Lands).



this chapter and no permit may be granted unless the county or municipality having jurisdiction has **first approved** the activity in question by zoning procedures provided by law.” (Emphasis added). Section 6604(b) sets forth specific criteria which the Secretary must consider prior to issuing a permit.

29. Delaware Administrative Code, Chapter 7502 was promulgated to implement 7 Delaware Code, Chapter 66. These regulations, at 8.0, “Application Procedure”, require that “[t]he **application shall contain** the following . . . [8.3.3] Evidence of local zoning approval”. (Emphasis added).

30. The power granted to DNREC to issue Wetlands permits “shall not authorize an activity in contravention of county or municipal zoning regulations.” 29 *Del. C.* § 6618

31. Additionally, state law requires that Sussex County approve any zoning application *before* DNREC may issue a wetlands permit: “No permit may be granted unless the county or municipality having jurisdiction has **first approved the activity in question by zoning procedures** provided by law.” 7 *Del. C.* § 6604(a). (Emphasis added).

32. Application has been made to the Sussex County Council for zoning approval for a conditional use that would permit the construction and operation of a substation to receive the transmission lines from the offshore field and regulate the electric current in order to transmit the electricity into the electric grid for

Maryland's use. Without the conditional use approval, under Sussex County's Zoning Code, the subject parcel would not be permitted to host a substation. Sussex County Zoning Code, §115-113.

33. As of the filing with DNREC by US Wind of the application for these permits, the notice of the public information session, the conduct of a virtual public hearing, the closing of the time for public comment on the US Wind project, and to the moment when this action is filed, no such zoning approval has been issued by Sussex County.

#### **COUNT II -- SUBAQUEOUS LANDS PERMIT APPLICATION**

34. Delaware Administrative Code, Chapter 75, relating to subaqueous lands, at 3.1.2.5 states the applicant "**shall attach evidence of zoning approval** for the Project. The Department may defer consideration of the application if it determines that substantive questions regarding the validity of the county's or municipality's actions are raised in an appeal of that action." (Emphasis added).

35. The power granted to the Secretary to issue permits, including use of subaqueous lands permits such as the one sought for this project, provides that "[n]o permit may be granted unless the county or municipality having jurisdiction has **first approved** the activity by zoning procedures provided by law." 7 Del. C. § 6003(c)(1). (Emphasis added).

36. Again, the matter of zoning approval for the subject parcel is currently

under consideration of the Sussex County Council and has not been issued, therefore, no evidence of zoning approval is attached to, or contained in, the application in this matter.

**COUNT III -- BEACH PRESERVATION-COASTAL COSTRUCTION**  
**PERMIT**

37. 7 Del. C. Chapter 68 governs and regulates construction, digging and other alterations in and on Delaware’s coastal beach areas, all of which require a permit. 7 Del. C. § 6805.

38. US Wind applied for such a permit in connection with its proposal to lay high-powered electric cables under the Delaware near-ocean waters, the public beach and the coastal lands in and around 3Rs Road.

39. Delaware Administrative Code, Chapter 5102, constitutes the Regulations Governing Beach Protection and the Use of Beaches, promulgated to implement 7 Delaware Code, Chapter 68. These regulations provide, as the initial step of application review, that “**the *Division shall make a decision*** on the applications which it determines will best implement the purposes of the Act and these Regulations. The Division shall give *written notice with reasons* to the applicant, to adjacent property owners as listed in the permit application and to other persons who have requested that they be notified of the decision on that application.” Section 5.4.1. (Emphasis added).

40. In this matter, the relevant Division with jurisdiction over the application for beach construction was the Division of Watershed Stewardship.

41. The Regulations provide, following any decision by the Division, that any person or taxpayer aggrieved by the decision of the Division can appeal to the DNREC Secretary by “giving written notice of appeal.” Section 6.2.1. The Secretary may hold a public hearing upon request, if he deems the request to be “meritorious.” *Id.* Following any such public hearing, which is evidentiary, the Secretary shall issue “an order that will best further the purposes of the Act and these Regulations and the order shall include reasons.” Sections 6.2.1; 6.2.1.3.

42. In this case, US Wind filed a Coastal Construction permit application pursuant to 7 Delaware Code, Chapter 68. The next procedural action that DNREC took was to issue a public notice of Permit Application (on or about April 28, 2024) and notice a “Joint Public Hearing” for all US Wind’s DNREC permit applications, including the application for coastal construction. However, at no point has the Division of Watershed Stewardship issued a decision on the application as mandated by 7 Del. Admin. Code 5102, § 5.4.1.

43. Plaintiffs, the public, and other interested parties have been deprived of the benefit of the Division’s decision, their right of appeal to the Secretary, and the ability to request a public evidentiary hearing as set forth in the Regulations. Only after such proceeding may the Secretary issue a decision and order on the permit.

The Secretary is not authorized to issue his 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.

**COUNT IV – DECLARATORY JUDGMENT AS TO ALL PERMITS**

44. 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. & Env'tl. 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).

45. Zoning approval is a mandatory component of the wetlands and subaqueous lands application process. Absent that approval, the Project, as proposed, cannot go forward.

46. State agencies are required to allow local governments, to which zoning authority has been granted by law, to resolve zoning matters independently, and cannot supersede that authority. *DNREC v. Sussex County*, 34 A.2d 1087 (Del. 2011), *Hayward v. Gaston*, 342 A.2d 760 (Del. 1988).

47. The regulations clearly anticipate agency compliance with all the requirements in the regulations, and that the agency will secure all the information that needs to be provided by the Applicant to complete its applications, including

zoning approval. If they did not, there would not be a provision specifically providing for the Department to defer action if an appeal of a zoning decision is active. That language assumes the initial zoning decision has been made before the Department considers action on the permit application. 7 Del. Admin. Code 7502, § 3.1.2.5.

48. As to the coastal construction permit, the Division of Watershed Stewardship is required by the regulations to issue a decision with articulated reasons for that decision, from which a member of the public can request an evidentiary hearing pursuant to Del. Admin. Code 5102. The July 9, 2024 joint public hearing, which included the coastal construction application, was not evidentiary.

49. Engaging in the public hearing process and taking other action before the application is complete, or before procedural prerequisites have been satisfied, is a futile effort that wastes time and money. Literally, hundreds of people have attended information sessions and/or public hearings (at which many DNREC staff were in attendance), and submitted comments on this Project, and yet, these subject applications were not and still are not complete.

### **Prayer for Relief**

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment as follows:

A. Declare that, pursuant to Delaware Administrative Code and statutes, the Delaware Department of Natural Resources and Environmental Control cannot grant a permit on an incomplete application that fails to include mandatory information.

B. Declare that, pursuant to Delaware Administrative Code and statutory law, the Secretary of the Delaware Department of Natural Resources and Environmental Control cannot grant an application for beach construction or alteration without following mandatory regulatory procedures and securing all materials as required by law.

C. Issue a writ of prohibition to prevent Defendants from granting permits under the aforesaid applications until each respective application is complete, and all required public hearings and comments have been held and received as to the complete applications, as required under Delaware Administrative Code and statutes.

D. Award Plaintiffs their reasonable attorneys' fees, expenses, and costs; and

E. Award any other relief the Court deems just and proper.

**BRADY LEGAL GROUP LLC**

*/s/ M. Jane Brady* \_\_\_\_\_

M. Jane Brady (Bar No. 1)

36365 Tarpon Drive

Lewes, Delaware 19958

Phone: (302) 542-1268

Email: bradylegalgroup@gmail.com

*Counsel for Plaintiffs, Caesar Rodney  
Institute, Paul “Wes” Townsend and  
George Merrick*

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