

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

JEANETTE SWAIN,)	
COLLINS PARK CIVIC ASSOC.)	
)	
Appellants,)	
)	
v.)	CZICB Appeal No. 2021-01
)	
THE STATE OF DELAWARE, DEPARTMENT)	
OF NATURAL RESOURCES AND)	
ENVIRONMENTAL CONTROL,)	
)	
Appellee.)	

**APPELLEE DELAWARE DEPARTMENT OF NATURAL RESOURCES AND
ENVIRONMENTAL CONTROL’S MOTION TO DISMISS**

Appellee the State of Delaware, Department of Natural Resources and Environmental Control (the “Department”), by and through their undersigned counsel, hereby moves the Coastal Zone Industrial Control Board (“Board”) to dismiss this appeal for the reasons set forth as follows:

I. INTRODUCTION

Appellants Jeanette Swain and the Collins Park Civic Association (“Appellants”) have filed an appeal (the “Appeal”)¹ of Secretary’s Order No. 2021-CZ-0019 (“Order 2021-CZ-0019”), which authorized issuance of a permit to FujiFilm Imaging Colorants, Inc. (hereinafter “FujiFilm”), to construct and operate a new manufacturing plant within an existing building to produce high performance aqueous pigment dispersions at its facility at 233 Cherry Lane, New Castle, Delaware 19720.² The Appeal must be dismissed in its entirety because Appellants have failed to demonstrate standing – a threshold issue – to bring their claims.

¹ See Statement of Appeal dated August 13, 2021 (the “Statement of Appeal”) from Secretary’s Order No. 2021-CZ-0019 (issued July 23, 2021).

² Order No. 2021-CZ-0019 at 1.

To have standing to appeal Order 2021-CZ-0019, Appellants must have been “aggrieved” by the Secretary’s action.³ Delaware Courts have established a three-part standard to meet the aggrieved requirement, the lack of any one of which defeats standing. As detailed below, the Appeal has failed to establish the required aspects and the Appeal should be dismissed.

II. BACKGROUND

The Appeal contests Order 2021-CZ-0019.⁴ Order 2021-CZ-0019 authorized issuance of a permit to FujiFilm to construct and operate a new manufacturing plant to produce high performance aqueous pigment dispersions within an existing building located at its facility at 233 Cherry Lane, New Castle, Delaware 19720.⁵ The issuance of Order No. Order 2021-CZ-0019 followed public comment and a public hearing.⁶ The Appeal is governed by 7 *Del. C.* § 7007, which provides that “[a]ny person aggrieved by a final decision of the Secretary must file notice of appeal with the State Coastal Zone Industrial Control Board within 14 days following announcement by the Secretary of his or her decision.”⁷

A motion to dismiss does not litigate the facts in dispute, but rather determines whether Appellants have stated a claim which could – assuming the facts are as they present them – entitle them to relief.⁸ Consideration of this Motion therefore assumes the allegations stated in the Statement of Appeal (the Department reserves the right to dispute such allegations at the Hearing) and those materials necessarily included, such as Order No. Order 2021-CZ-0019. The

³ 7 *Del. C.* § 7007(b).

⁴ Statement of Appeal at 1.

⁵ Order 2021-CZ-0019 at 1.

⁶ Order 2021-CZ-0019 at 8.

⁷ 7 *Del. C.* § 7007(b).

⁸ See *Eastern Shore Env'tl. v. Del. Solid Waste Auth.*, 2004 WL 440413, at *2-3 (Del. Super. Feb. 26, 2004) (while a motion to dismiss treats the allegations as true, if the party bringing an appeal survives a motion to dismiss on standing they must thereafter substantiate their allegations, including allegations on standing).

Department therefore avoids a lengthy recitation of the facts and instead refers to the allegations included in the Statement of Appeal.

III. ARGUMENT

The Appeal should be dismissed in its entirety for lack of standing.⁹ “Standing is a threshold question” to ensure the party is in fact entitled to mount a legal challenge.¹⁰ The Coastal Zone Act provides a right to appeal to the Board for: “[a]ny person aggrieved by a final decision of the Secretary.”¹¹ In *Nichols v. Coastal Zone Industrial Control Board*, the Delaware Supreme Court applied the same standing requirements for an appeal to this Board as would be required for an appeal to the Environmental Appeals Board.¹² Thus, to have standing to appeal, Appellants must show: (1) that Appellants have suffered an injury in fact that is concrete and particularized, (2) that Appellant’s injury is “fairly traceable to the challenged action of the defendant,” and (3) that Appellant’s injury must be capable of being remedied by a favorable ruling by the Board.¹³ Appellants, as “[t]he party invoking the jurisdiction of the court, or the Board, bears the burden of proving that he or she has standing to bring the action.”¹⁴ All three elements must be met.¹⁵

⁹ See *Nichols v. Coastal Zone Industrial Control Board*, 74 A.3d 636, 644 (Del. 2013) (dismissal affirmed for lack of standing); *Thurman v. Del. Dep’t of Nat’l Res. and Env’tl. Control*, EAB Appeal No. 2017-09, at 7 (Apr. 9, 2018) (dismissing for lack of standing) (attached as Exhibit A); *Nichols v. Del. Dep’t of Nat’l Res. and Env’tl. Control*, EAB Appeal No. 2019-04, at 6 (Nov. 15, 2019) (dismissing for lack of standing) (attached as Exhibit B).

¹⁰ *Dover Historical Soc. v. City of Dover Planning Comm’n*, 838 A.2d 1103, 1110 (Del. 2003).

¹¹ 7 Del. C. § 7007(b).

¹² *Nichols*, 74 A.3d at 644 (quoting *Oceanport*, 636 A2d at 901).

¹³ *Food & Water Watch v. Del. Dep’t of Natural Res. and Env’tl. Control*, 2018 WL 4062112, at *3 (Del. Super. Aug. 24, 2018). See also *Oceanport Indus., Inc.*, 636 A.2d 892, 903 (Del. 1994)(quoting *Gannett Co. v. State*, 565 A.2d 895, 897 (Del. 1989)); *Nichols*, 74 A.3d at 642-44 (adopting the *Oceanport Industries* standard to CZA appeals); *Breslin v. Richard*, 1994 WL 1892113, at *5 (Del. Super. July 22, 1994).

¹⁴ *Eastern Shore Env’tl.*, 2004 WL 440413, at *3; *Nichols*, 74 A.3d at 644 (appellant failed to meet his burden). See also *Dover Historical Soc.*, 838 A.2d at 1110.

¹⁵ *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

1. Appellants Have Not Established An Injury In Fact

First, Appellants “must have suffered an injury in fact, which is the invasion of a legally protected interest within the zone of interest sought to be protected or regulated by the statute.”¹⁶ “The invasion must be a) concrete and particularized, and b) actual or imminent, not conjectural or hypothetical.”¹⁷ And Appellants must show that they have “an interest distinguishable from the public at large or that they will realize a direct harm from the challenged government action.”¹⁸ Each aspect of this requirement must be met and the failure to meet any of these requirements mandates dismissal. Here, the Statement of Appeal fails to allege any injury in fact whatsoever, let alone one that is concrete and particularized, actual or imminent, and distinguishable from the public at large. The Appeal must therefore be dismissed.

Appellant’s Statement of Appeal asserts that the Secretary has erred in various respects, including allegedly failing to “consider all environmental impacts and effects on neighboring land uses and require the offset of all negative impacts.”¹⁹ Nothing in the Statement of Appeal alleges, however, how Appellants have suffered an injury in fact.

By failing to identify any injury in fact, the Appeal necessarily also fails to allege that Appellant’s alleged injury fall within the zone of interest sought to be protected or regulated by the statute.²⁰ Appellants’ failure to state an injury within the zone of interest sought to be protected or regulated by the statute is a separate and sufficient basis for dismissal.

¹⁶ *Oceanport Indus.*, 636 A.2d at 904; *see also Nichols*, 74 A.3d at 642-43 (quoting *Oceanport Indus.*, 636 A.2d at 904).

¹⁷ *Nichols*, 74 A.3d at 643 (internal quotations omitted); *Oceanport Indus.*, 636 A.2d at 904 (same).

¹⁸ *Food & Water Watch*, 2018 WL 4062112, at *4.

¹⁹ Statement of Appeal at 2.

²⁰ *Nichols*, 74 A.3d at 642-43 (quoting *Oceanport Indus.*, 636 A.2d at 904). *See also Breslin*, 1994 WL 1892113, at *5-6.

Appellants likewise fail to allege injuries that are “concrete and particularized,” and “actual or imminent.”²¹ “[A] party seeking review must show ‘that the alleged injury [actually affects] the plaintiff in a personal and individual manner....’”²² Here, the Statement of Appeal contains no allegations to support a personal and individual injury, let alone one that is concrete and particularized and actual or imminent, and thus fails to establish standing.²³

Further, “the plaintiff’s interest in the controversy must be distinguished from the interest shared by other members of a class or the public in general.”²⁴ “It seems clear that the intent of the legislature was to limit standing to appeal to those who were actually affected by the Secretary’s decisions. It seems equally clear that the General Assembly did not open the flood gates to anyone who merely claimed an interest in the matter.”²⁵ Because the Appellants fail to allege any such injury, the Appeal must be dismissed.

As Appellants have failed to allege any of the requirements of an injury in fact – concrete and particularized; actual or imminent; within the zone of interest sought to be protected by the statute; and for an interest distinguishable from the public at large, any one of which individually would be a basis for dismissal – the Appeal should be dismissed.

2. Appellants’ Alleged Injury Is Not Fairly Traceable to Order 2021-CZ-0019

Second, Appellants must show that their alleged injury is “fairly traceable to the challenged action of the defendant.”²⁶ As Appellants have not alleged an injury in fact, they have likewise

²¹ *Nichols*, 74 A.3d at 642-43 (quoting *Oceanport Indus.*, 636 A.2d at 904). See also *Food & Water Watch*, 2018 WL 4062112, at *5.

²² *Food & Water Watch*, 2018 WL 4062112, at *5 (quotations and modification in original, citation omitted).

²³ See generally Statement of Appeal.

²⁴ *Food & Water Watch*, 2018 WL 4062112, at *5 (quoting *Dover Historical Soc.*, 838 A.2d at 1116).

²⁵ *Nichols*, 74 A.3d at 642.

²⁶ *Food & Water Watch*, 2018 WL 4062112, at *3.

failed to allege an injury traceable to Order No. 2021-CZ-0019. Appellants have failed to allege this separate element of standing, and the Appeal should be dismissed on this independent basis.

3. Appellants Have Failed to Allege Organizational Standing

Furthermore, organizations bear the burden of proving that 1) the interests to be protected by the suit are germane to the organization's purpose; and 2) neither the claim asserted nor the relief requested requires the participation of individual members; and 3) the organization's members would otherwise have standing.²⁷ Appellants' Appeal fails to provide any allegations as to any of these three requirements as to the organizational Appellant, Collins Park Civic Association. The Appeal fails as to the organizational Appellant on this independent basis.

CONCLUSION

For the reasons stated herein, Appellants, Jeanette Swain and the Collins Park Civic Association, have failed to establish that they have standing to bring this Appeal, and therefore, the Board does not have jurisdiction over this matter. Therefore, Appellee, the State of Delaware, Department of Natural Resources and Environmental Control, respectfully requests that the Board dismiss the Appeal.

²⁷ *Delaware Audubon v. Delaware Dep't of Nat. Res. & Env't Control*, No. CV N17A-03-007 DCS, 2018 WL 526594, at *4 (Del. Super. Ct. Jan. 19, 2018).

Respectfully Submitted,

**STATE OF DELAWARE
DEPARTMENT OF JUSTICE**

/s/ Jameson A.L. Tweedie

Devera B. Scott (DE Bar ID No. 4756)

Jameson A.L. Tweedie (DE Bar ID No. 4927)

Deputy Attorneys General

391 Lukens Drive

New Castle, Delaware 19720

Devera.Scott@delaware.gov

Jameson.Tweedie@delaware.gov

Phone: (302) 395-2521

*Counsel for Appellee the State of Delaware,
Department of Natural Resources & Environmental
Control*

September 7, 2021

Exhibit A

Thurman v. Del. Dep't of Nat'l Res. and Envtl. Control, EAB Appeal No. 2017-09 (Apr. 9, 2018).

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
OF THE STATE OF DELAWARE**

SUZANNE E. P. THURMAN)	
)	
Appellant,)	
)	
v.)	EAB Appeal No. 2017-09
)	
DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL,)	
)	
Appellee,)	
)	
CITY OF REHOBOTH BEACH,)	
)	
Intervenor-Appellee.)	

DECISION AND FINAL ORDER

Pursuant to due and proper notice of time and place of hearing served on all parties in interest and to the public, the above-stated cause of action came before the Environmental Appeals Board (“Board”) on January 9, 2018, in the Auditorium of the Richardson & Robbins Building, located at 89 Kings Highway, Dover, Kent County, Delaware.

Members of the Board present and constituting a quorum were: Dean Holden (Chair), Michael Horsey, Robert Mulrooney, Sebastian LaRocca, Frances Riddle and Guy Marcozzi. No Board Members disqualified themselves or were otherwise disqualified. Deputy Attorney General Kevin P. Maloney represented the Board.

Appellant Suzanne E.P. Thurman (“Appellant”) appeared pro se. Deputy Attorney General William J. Kassab represented Appellee Delaware Department of Natural Resources and Environmental Control (“DNREC”) and Glenn Mandalas, Esquire represented the City of Rehoboth Beach (“Rehoboth”).

STATEMENT OF THE CASE AND PROCEEDINGS

On May 25, 2017, DNREC issued Secretary's Order No. 2017-W-0014 (the "Ocean Outfall Order" or the "Order") which issued several permits to Rehoboth authorizing the City to construct and operate an ocean outfall to dispose of its treated effluent from its wastewater treatment facility.

On June 13, 2017, the Appellant filed a Notice of Appeal pursuant to 7 *Del. C.* §§ 6008 and 6009 (the "Appeal"). Appellees filed Motions to Dismiss on both lack of standing and lack of subject matter jurisdiction grounds.

MATTERS BEFORE THE BOARD

Prior to the hearing of evidence and argument on the merits of the appeal, the Board considered DNREC's and Rehoboth's Motions to Dismiss for lack of standing and subject matter jurisdiction. The Board also considered Appellant's written response to the Motions to Dismiss. DNREC and Rehoboth presented oral argument on their respective motions (in favor of dismissal), followed by oral argument by Appellant in opposition to the motions (in opposition to dismissal).

A. DNREC and Rehoboth's Motion to Dismiss

In its Motion to Dismiss, which Rehoboth joins, DNREC requests that the Board dismiss Appellant's appeal. DNREC argues in its motion and before the Board that the Appellant does not have standing pursuant to the statutory requirement set forth in 7 *Del. C.* §6008(a) to pursue her appeal. Specifically, DNREC argues that the Appellant is not "substantially affected" by the Secretary's Order, as required by the express language in § 6008(a) as interpreted by the Delaware Supreme Court in the case of *Oceanport Industries, Inc. v. Wilmington Stevedores*,¹ because Appellant has not suffered an "injury-in-fact". DNREC contends that, to invoke standing before the Board, the Appellant's injury cannot be an injury or harm suffered or shared by the public

¹ 636 A. 2d 892 (Del. 1994).

generally. Rather, the Appellant must prove that the injury is “concrete and particularized” and “actual or imminent” and not “conjectural or hypothetical”, as required by the standard established by *Oceanport Industries*. DNREC distinguishes this stricter standard from the broader, more generalized standard applicable to the public hearing stage of the permit process. DNREC contends that the Appellant has failed to satisfy her burden of proof to establish standing and therefore her appeal must be dismissed.

DNREC and Rehoboth also argue in their Motions to Dismiss that the Board lacks subject matter jurisdiction over the appeal and that the lack of subject matter jurisdiction should act independently from the issue of standing and deprive the Board of authority to adjudicate the appeal.

B. Appellant’s Response To DNREC and Rehoboth’s Motions To Dismiss

Appellant requests that the Board deny the DNREC and Rehoboth Motions to Dismiss. Appellant testified that she has been a resident of coastal Delaware since 1970 and that she is the founding director of the Marine Education, Research and Rehabilitation Institute (“MERR”) which is the “official authorized stranding response organization for marine mammals and sea turtles which strand in Delaware.”

Appellant acknowledged that she is proceeding pro se due to difficulty finding an attorney without a conflict of interest and because MERR could not afford to retain an attorney to prosecute the appeal. Appellant testified that she has been providing comments on the proposed outfall since 2009. The Appellant acknowledged that she is not asking for a reversal of the Secretary’s Order, rather she is seeking the imposition of additional mitigation measures. Appellant testified that her “interests and concern in protecting the marine environment far exceeds that of the average citizen

based on the personal time, finances, and other resources” she has contributed to marine ecosystem preservation.

Appellant claimed that the “ongoing cumulative impacts of the operation of the outfall will cause [her] direct harm and suffering due to the undue burden” that will lead to an increased number of responses.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board entered into executive session as permitted by 7 *Del. C.* §6008(a) to deliberate and consider the parties written submissions, and the arguments presented. By a vote of 5 to 1, the Board granted Appellee’s Motion to Dismiss, on the basis that the Appellant has failed to meet her burden of proof to establish standing to bring this appeal for the reasons which follow. By granting the Motion to Dismiss for lack of standing, the additional Motion to Dismiss made by DNREC and Rehoboth on subject matter jurisdiction grounds, is rendered moot and therefore need not be decided by the Board.²

As noted *supra*, the statutory requirements for standing to bring an appeal before this Board are set forth in § 6008(a) and in the Board’s regulations. Section 6008(a) states, in relevant part: “Any person whose interest is substantially affected by any action of the Secretary may appeal to the Environmental Appeals Board within 20 days after receipt of the Secretary’s decision or publication of the decision.”

In essence, the dispositive issue on the motions to dismiss for lack of standing is what the statutory term “substantially affected” means and, based on that meaning, whether the Appellant’s

² A motion to dismiss is a case dispositive motion. Absent a showing of standing by an Appellant, this Board does not have jurisdiction to hear an appeal.

interests are “substantially affected” by the Secretary’s Order. The Delaware Supreme Court directly addressed this question in the *Oceanport Industries, Inc. v. Wilmington Stevedores*, which is applicable legal precedent that this Board is bound to follow.

In *Oceanport Industries*, the Court noted that the General Assembly had not defined the term “substantially affected” when it enacted § 6008(a). The Court also noted that the General Assembly “provided a role for the participation of the general public in the protection of natural resources by establishing a minimal standing requirement for involvement in hearings during permit process”, citing § 6004(b).³ Once a permit has issued, as Permit No. 2017-W-0014 has in this matter, the standing requirement “becomes the more stringent ‘substantially affected’ test...” To that end, the Court held that a party must show in “injury in fact” and that such injury is within the zone of interest sought to be protected by the statute.

Furthermore, in a later case appealed from a decision of this Board, the Delaware Superior Court, in *Eastern Shore Environmental, Inc. v. Delaware Solid Waste Authority*⁴, similarly set forth the requirements for standing before this Board. The Superior Court, citing the prior holdings of the Delaware Supreme Court in *Oceanport Industries* and *Dover Historical Society v. City of Dover Planning Commission*⁵, held that an “‘injury in fact’ is an *invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.*” (Emphasis added).

Under *Oceanport Industries*, the Appellant bears the burden of proof to establish standing and is required to show that she has suffered an injury in fact and that such injury is within the

³ Section 6004(b) states, in pertinent part, “The Secretary shall hold a public hearing on an application, if he or she receives a meritorious request for a hearing within a reasonable time as stated in the advertisement” and “[a] public hearing may be held on any application if the Secretary deems it to be in the best interests of the State to do so” and “[a] public hearing request shall be deemed meritorious if it exhibits a familiarity with the application and a reasoned statement of the permit’s probably impact.”

⁴ 2004 WL 440413 (Del. Super. Feb. 26, 2004)

⁵ 838 A.2d 1103 (Del. 2003)

zone of interest sought to be protected (*i.e.*, that she has been “substantially affected” by the Secretary’s Order). Appellant’s evidentiary showing and argument (written and oral) before the Board, however, have failed to establish that she personally has been “substantially affected” by the Secretary’s Order, based on the statutory requirement for standing as set forth in § 6008(a), as the term “substantially affected” has been interpreted and defined by the Delaware Courts.

The Board finds Appellant has been a resident of coastal Delaware since 1970. She is the founding director of the Marine Education, Research and Rehabilitation Institute (“MERR”). MERR is a stranding response organization for marine mammals and sea turtles that strand in Delaware. The Board finds that Appellant is proceeding *pro se* and not on behalf of MERR.⁶ The Board accepts Appellant’s testimony that MERR could not bear the financial liability of hiring counsel and encountered conflict of interest issues when it attempted to retain counsel to represent MERR. The Board commends Appellant for her commitment and passion to the cause of stranded marine animals and appreciates her heartfelt presentation of her case. It cannot, however, find that Appellant has suffered an injury as a result of the ocean outfall that is “particularized and concrete” or distinguishable from the public at large. Regardless of how sincere the Appellant’s interest is in preserving the marine environment, her legally protected interest in the ocean is no different from any other member of the public’s legally protected interest in the ocean. Appellant has not pointed to anything in the Secretary’s Order that substantially affects her legally protected interests. Nothing in the Secretary’s Order affects Appellant in a personal or individual manner as compared to the Order’s impacts on the general public.

⁶ In Delaware, artificial entities must be represented by counsel. *See Transpolymer Indus., Inc. v. Chapel Main Corp.*, 582 A.2d 936 (table) (Del. Sep.18, 1990).

In light of the facts alleged in Appellant's Statement of Appeal, the facts alleged in her written response to the motions to dismiss, as well as the evidence presented at the hearing, all viewed in a light most favorable to Appellant, the Board finds that the Appellant has not established that she has been "substantially affected" by the Secretary's Order. Appellant's contentions, while articulately presented, are not distinguishable from those that could be raised by the general public. Appellant is, in essence, advocating for the public at large and has provided no factual basis to demonstrate that she has a unique personal stake in the matter and that her "injuries" are concrete and particularized, and more than generalized concerns regarding potential environmental harms. Thus, Appellant has no standing to pursue her appeal and the motion to dismiss for lack of standing is properly granted.

IT IS SO ORDERED, this _____ day of April, 2018.

Dean Holden, Chairperson

The following five Board members concur in this decision.

Date: _____

Robert Mulrooney
Board Member

Date: _____

Michael Horsey
Board Member

Date: _____

Frances Riddle
Board Member

Date: _____

Guy Marcozzi
Board Member

The following Board member does not concur in the decision.

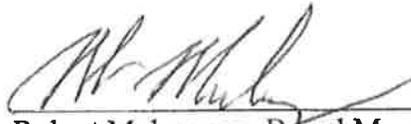
Date: _____

Sebastian LaRocca
Board Member

Date: 3/9/2018


Dean Holden, Chairperson

Date: 4/8/2018



Robert Mulrooney, Board Member

Date: 4/2/18

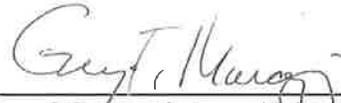

Michael Horsey, Board Member

Date: 4/2/18



Frances Riddle, Board Member

Date: 4/4/18



Guy Marcozzi, Board Member

Date: April 3, 2018


Sebastian LaRocca, Board Member

Exhibit B

Nichols v. Del. Dep't of Nat'l Res. and Envtl. Control, EAB Appeal No. 2019-04, at 6 (Nov. 15, 2019).

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
OF THE STATE OF DELAWARE**

JOHN A. NICHOLS,)	
)	
Appellant,)	
)	
v.)	EAB Appeal No. 2019-04
SECRETARY M. SHAWN GARVIN)	
AND THE DELAWARE DEPARTMENT)	
OF NATURAL RESOURCES AND)	
ENVIRONMENTAL CONTROL,)	
)	
Appellee.)	

DECISION AND FINAL ORDER

Pursuant to due and proper notice of time and place of hearing served on all parties in interest and to the public, the above-stated cause of action came before the Environmental Appeals Board (“Board”) on September 24, 2019, in the Auditorium of the Richardson & Robbins Building, located at 89 Kings Highway, Dover, Kent County, Delaware.

Members of the Board present and constituting a quorum were: Dean Holden (Chair), Michael Horsey, Frances Riddle and Randall Horne. No Board Members disqualified themselves or were otherwise disqualified. Deputy Attorney General Kevin P. Maloney represented the Board.

Appellant John A. Nichols (“Appellant”) appeared pro se. Deputy Attorney General Jameson A. L. Tweedie represented Appellee Delaware Department of Natural Resources and Environmental Control (“DNREC”).

STATEMENT OF THE CASE AND PROCEEDINGS

On April 22, 2019, DNREC issued Secretary's Order No. 2019-A-0019 (the "Order") which authorized issuance of two air construction permits to Diamond State Generating Partners, LLC ("Bloom") relating to the replacement of existing fuel cells at Bloom's Red Lion and Brookside facilities. On May 6, 2019, the Appellant filed a Notice of Appeal pursuant to 7 *Del. C.* §§ 6008 and 6009 (the "Appeal"). Appellee filed Motions to Dismiss on both lack of standing and lack of subject matter jurisdiction grounds.

MATTERS BEFORE THE BOARD

Prior to the hearing of evidence and argument on the merits of the appeal, the Board considered DNREC's Motion to Dismiss for lack of standing and subject matter jurisdiction. The Board also considered Appellant's written response to the Motions to Dismiss. DNREC presented oral argument on its motion (in favor of dismissal), followed by oral argument by Appellant in opposition to the motion (in opposition to dismissal).

A. DNREC's Motion to Dismiss

In its Motion to Dismiss DNREC requests that the Board dismiss Appellant's appeal. DNREC argues in its motion and before the Board that the Appellant does not have standing pursuant to the statutory requirement set forth in 7 *Del. C.* §6008(a) to pursue his appeal. Specifically, DNREC argues that the Appellant is not "substantially affected" by the Secretary's Order, as required by the express language in § 6008(a) as interpreted by the Delaware Supreme Court in the case of *Oceanport Industries, Inc. v. Wilmington Stevedores*,¹ because Appellant has not suffered an "injury-in-fact". DNREC contends that, to invoke standing before the Board, the

¹ 636 A. 2d 892 (Del. 1994).

Appellant's injury cannot be an injury or harm suffered or shared by the public generally. Rather, the Appellant must prove that the injury is "concrete and particularized" and "actual or imminent" and not "conjectural or hypothetical", as required by the standard established by *Oceanport Industries*. DNREC distinguishes this stricter standard from the broader, more generalized standard applicable to the public hearing stage of the permit process. DNREC contends that the Appellant has failed to satisfy his burden of proof to establish standing and therefore his appeal must be dismissed.

DNREC also argues in its Motion to Dismiss that the Board lacks subject matter jurisdiction over the appeal and that the lack of subject matter jurisdiction should act independently from the issue of standing and deprive the Board of authority to adjudicate the appeal.

B. Appellant's Response To DNREC's Motions To Dismiss

Appellant requests that the Board deny the DNREC Motion to Dismiss. Appellant contends that he has standing to challenge the Order because he is a resident of Delaware and will be "personally affected by whatever environmental harm might result" from the Order and that he is a long-time Delmarva Power ratepayer who has been paying the QFCP tariff on his monthly electric bills.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board entered into executive session as permitted by 7 Del. C. §6008(a) to deliberate and consider the parties written submissions, and the arguments presented. By a vote of 4 to 0, the Board granted Appellee's Motion to Dismiss, on the basis that the Appellant has failed to meet his burden of proof to establish standing to bring this appeal for the reasons which follow. By granting the Motion to Dismiss for lack of standing, the additional argument made by DNREC on

subject matter jurisdiction grounds, is rendered moot and therefore need not be decided by the Board.²

As noted *supra*, the statutory requirements for standing to bring an appeal before this Board are set forth in § 6008(a) and in the Board's regulations. "Standing is a threshold question" to ensure the party is in fact entitled to mount a legal challenge.³ Section 6008(a) states, in relevant part: "Any person whose interest is substantially affected by any action of the Secretary may appeal to the Environmental Appeals Board within 20 days after receipt of the Secretary's decision or publication of the decision."

The dispositive issue on the motions to dismiss for lack of standing is what the statutory term "substantially affected" means and, based on that meaning, whether the Appellant's interests are "substantially affected" by the Secretary's Order. The Delaware Supreme Court directly addressed this question in the *Oceanport Industries, Inc. v. Wilmington Stevedores*, which is applicable legal precedent that this Board is bound to follow.

In *Oceanport Industries*, the Court noted that the General Assembly had not defined the term "substantially affected" when it enacted § 6008(a). The Court also noted that the General Assembly "provided a role for the participation of the general public in the protection of natural resources by establishing a minimal standing requirement for involvement in hearings during permit process", citing § 6004(b).⁴ Once a permit has issued, as it has been in this matter, the standing requirement "becomes the more stringent 'substantially affected' test..." To that end, the

² A motion to dismiss is a case dispositive motion. Absent a showing of standing by an Appellant, this Board does not have jurisdiction to hear an appeal.

³ *Dover Historical Soc. V. City of Dover Planning Comm'n*, 838 A. 2d 1103, 1110 (Del. 2003).

⁴ Section 6004(b) states, in pertinent part, "The Secretary shall hold a public hearing on an application, if he or she receives a meritorious request for a hearing within a reasonable time as stated in the advertisement" and "[a] public hearing may be held on any application if the Secretary deems it to be in the best interests of the State to do so" and "[a] public hearing request shall be deemed meritorious if it exhibits a familiarity with the application and a reasoned statement of the permit's probably impact."

Court held that a party must show in “injury in fact” and that such injury is within the zone of interest sought to be protected by the statute.

Furthermore, in a later case appealed from a decision of this Board, the Delaware Superior Court, in *Eastern Shore Environmental, Inc. v. Delaware Solid Waste Authority*⁵, similarly set forth the requirements for standing before this Board. The Superior Court, citing the prior holdings of the Delaware Supreme Court in *Oceanport Industries* and *Dover Historical Society v. City of Dover Planning Commission*⁶, held that an “injury in fact” is an *invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.*” (Emphasis added).

Under *Oceanport Industries*, the Appellant bears the burden of proof to establish standing and is required to show that he has suffered an injury in fact and that such injury is within the zone of interest sought to be protected (*i.e.*, that he has been “substantially affected” by the Order). Appellant’s evidentiary showing and argument (written and oral) before the Board, however, has failed to establish that he personally has been “substantially affected” by the Secretary’s Order, based on the statutory requirement for standing as set forth in § 6008(a), as the term “substantially affected” has been interpreted and defined by the Delaware Courts.

The Board finds Appellant is a resident of Delaware. The Board finds that Appellant is proceeding pro se. The Board commends Appellant for his commitment and passion to the cause of Delaware’s environment and appreciates his determined presentation of his case. It cannot, however, find that Appellant has suffered an injury because of the Order that is “particularized and concrete” or distinguishable from the public at large. Regardless of how sincere the Appellant’s interest is in preserving the environment, his legally protected interest in the quality

⁵ 2004 WL 440413 (Del. Super. Feb. 26, 2004)

⁶ 838 A.2d 1103 (Del. 2003)

of Delaware's air is no different from any other member of the public's legally protected interest in air quality. "The mere allegation of a sincere interest in an environmental problem is not sufficient to confer standing."⁷ Appellant has not pointed to anything in the Order that substantially affects his legally protected interests. Nothing in the Order affects Appellant in a personal or individual manner as compared to the Order's impacts on the general public.

Considering the facts alleged in Appellant's Statement of Appeal, the facts alleged in his written response to the motion to dismiss, as well as the evidence presented at the hearing, all viewed in a light most favorable to Appellant, the Board finds that the Appellant has not established that he has been "substantially affected" by the Secretary's Order. Appellant's contentions, while articulately presented, are not distinguishable from those that could be raised by the general public. Appellant is, in essence, advocating for the public at large and has provided no factual basis to demonstrate that he has a unique personal stake in the matter and that his "injuries" are concrete and particularized, and more than generalized concerns regarding potential environmental harms. Thus, Appellant has no standing to pursue his appeal and the motion to dismiss for lack of standing is properly granted.

⁷ *Oceanport Indus., Inc.*, 636 A. 2d at 905.

IT IS SO ORDERED, this 15th day of November, 2019.

Dean Holden, Chairperson

The following Board members concur in this decision.

Date: _____

Michael Horsey
Board Member

Date: _____

Frances Riddle
Board Member

Date: _____

Randall Horne
Board Member

EAB Appeal No. 2019-04 Decision and Final Order

Date: Nov. 15, 2019



Dean Holden/Chairperson

EAB Appeal No. 2019-04 Decision and Final Order

Date: 11/27/19



Michael Horsey, Board Member

EAB Appeal No. 2019-04 Decision and Final Order

Date: 11/15/19



Frances Riddle, Board Member

EAB Appeal No. 2019-04 Decision and Final Order

Date: 11/27/19


Randall Horne, Board Member