BEFORE THE
COASTAL ZONE INDUSTRIAL CONTROL BOARD

JEANETTE SWAIN, COLLINS PARK CIVIC ASSOCIATION,	)	
Appellants,	)	
v.	)	No. 2021-01
DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL, and FUJIFILM IMAGING COLORANTS, INC., Permittee,	)	
Appellees.	)	

APPELLANTS' RESPONSE
IN OPPOSITION TO DNREC'S MOTION TO DISMISS

Appellants Jeanette Swain and Collins Park Civic Association, by and through their counsel, hereby respond in opposition to DNREC's Motion to Dismiss, and in support thereof state as follows:

1. On Tuesday, September 7, 2021, DNREC served its Motion to Dismiss, seeking dismissal of this appeal because Appellants "have failed to establish that they have standing to bring this Appeal." The Motion apparently rests on the notion that the Statement of Appeal filed on August 13, 2021 itself does not "establish" or prove Appellants' standing.

2. The Motion as written is without legal merit for the following reasons:

A. While Appellants generally agree that they must ultimately show standing to proceed and prevail in this appeal, there is no requirement in the Coastal Zone Act or the CZA Regulations requiring that an aggrieved party must "establish" or prove standing *in the Statement of Appeal itself*. This Board's own Application to Appeal from a Coastal Zone Act Decision form

that Appellants used says nothing about alleging—much less proving—standing when one uses the form.

B. 7 Del. C. § 7007(b)—which creates the right of an aggrieved person to appeal a CZA permitting decision to this Board—creates no requirement for pleading standing. In fact, § 7007(b) specifically mandates that, once the person files a notice of appeal, the Board "***must hold a hearing*** and render its decision in the form of a final order within 60 days following receipt of the appeal notification" (emphasis supplied). In other words, the Board is statutorily required to hold a hearing once Appellants filed, and the Board accepted, the Statement of Appeal. To rule prior to the holding of the hearing would violate this statutory command.

C. The CZA Regulations (7 Del. Admin. C. 101) also contain no requirement that standing must be proven in the Statement of Appeal. Instead, § 16.2.3 of the CZA Regulations states that "[t]he Board must process and rule on the appeal in accordance with 29 Del. C. Ch. 101, Subchapter III," or 29 Del. C. §§ 10121-10129. None of these sections of the Delaware Administrative Procedures Act require proof of standing, nor do they contemplate the dismissal of an action without a public hearing. Instead, these sections contemplate a public hearing take place. Thus, proceeding to dismiss an appeal before the statutorily mandated public hearing would violate the Delaware Administrative Procedures Act.

D. Even *Nichols v. Coastal Zone Industrial Control Board*, 74 A.3d 636 (Del. 2013), cited by DNREC in the Motion, involved a dismissal on the basis of standing ***after*** the Board had held a public hearing and allowed Appellant Nichols the opportunity to prove standing. *See* 74 A,3d at 638 (after indicating that DNREC and the permittee had filed motions to dismiss on the basis of standing, "A hearing was held (the "Hearing") before the Coastal Zone Industrial Control Board to address Nichols' appeal"). Indeed, in that case, the Board, the Superior Court, and the

Supreme Court cited to Nichols' failure to present evidence at the hearing to support their conclusions that Nichols has failed to establish standing. *See* 74 A.3d at 644 ("Despite several opportunities, Nichols declined to be sworn in at the Hearing. Thus, he provided no testimony as to how the facility would affect any of his legal rights").[1]

Quite simply, there is no legal basis to dismiss the appeal prior to the public hearing. Nor is there any valid basis for DNREC's attempt to limit the evidence on standing to what was in the Statement of Appeal.

3. Instead, what the CZA, the APA, and *Nichols* all contemplate is a public hearing at which Appellants can present evidence, including evidence of their standing. That is exactly what Appellants plan to do. The evidence will show, among other things, that Jeanettte Swain lives approximately 1000 feet from the Fujifilm plant, has been and will be regularly exposed to emissions from that plant, and would be adversely affected by the increased emissions of a variety of pollutants under the Permit at issue on appeal. Her testimony will establish all of the elements of the law of individual standing outlined in DNREC's Motion. The evidence will also show that Collins Park (where Ms. Swain lives) is the residential community closest to the Fujifilm plant, has been and will be regularly exposed to emissions from the plant, and has residents (like children) who are vulnerable to the increased emissions of pollutants like lead allowed under the Permit. Ms. Swain, as an officer of the Collins Park Civic Association, will testify to all the elements of

[1] *Nichols* is not the only case cited by DNREC that allowed testimony or evidence before deciding the standing question. *Thurman v. DNREC*, EAB Appeal No. 2017-09 (April 9, 2018)—attached as Exhibit A to the Motion—shows that the EAB allowed the appellant to testify about her standing. *See id.* at 3 ("Appellant testified that she was a resident of coastal Delaware since 1970 . . .); *id*. at 6 ("Appellant's evidentiary showing and argument (written and oral) before the Board, however, have failed to show that she personally had been "'substantially affect' . . ."). *Food & Water Watch v. DNREC*, 2018 WL 4062112 (Del. Super. Aug. 24, 2018), reversed an EAB decision dismissing for standing made after standing affidavits had been submitted to the Board. In *Eastern Shore Environmental, Inc. v. Del. Solid Waste Authority*, 2004 WL 440413 (Del. Super. February 26, 2004), the Court reversed an EAB decision on standing because it failed to consider affidavits or take testimony on the issue of standing. Id. at *2.

associational standing outlined in DNREC's Motion. The Board should allow the public hearing to go forward so it can hear the ample evidence that supports Appellants' standing.

DNREC's Motion as written appears to seek dismissal before the hearing and seeks to limit the sources of evidence for deciding its Motion to what is alleged in the Statement of Appeal alone. That Motion should be denied for the reasons described above. To the extent that DNREC claims to be arguing for neither of those things, and merely filed a placeholder motion for consideration after the hearing (a position which would contradict the language in the Motion), then the Board should not rule on the Motion at this time, and let Appellants present their standing evidence at the hearing.

September 7, 2021

Respectfully submitted,

JEANETTE SWAIN and COLLINS PARK CIVIC ASSOCIATION

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