

BEFORE THE ENVIRONMENTAL APPEALS BOARD

STATE OF DELAWARE

IN THE MATTER OF)
) Appeal No. 94-02
GREGORY & MARY SWIFT)

FINAL ORDER

The Environmental Appeals Board ("Board") held a hearing on this appeal on July 12, 1994. The Board members present were Clifton H. Hubbard, Jr., Chairman, Joan Donoho, Robert S. Ehrlich, Diana A. Jones, Charles Morris and Robert I. Samuel. Steven C. Blackmore, Deputy Attorney General, advised the Board. Gregory and Mary Swift were represented by Robert J. Swift, Esquire. Jeanne L. Langdon, Deputy Attorney General, represented the Secretary of the Department of Natural Resources and Environmental Control ("DNREC"). For the reasons that follow, the Board denies DNREC's Motion to Dismiss.

SUMMARY OF THE EVIDENCE

The Swifts are residents of Frog Hollow, a development in Yorklyn, New Castle County, Delaware. The developer of Frog Hollow, Thomas Payne, received a permit from DNREC authorizing the use of an existing sewage disposal system, Permit No. 61-94N ("Permit"). The Swifts contend that this Permit should not have been granted since the original (prior) permit provided that no extensions would be authorized. The Swifts also contend that the Permit violates DNREC's regulations since the disposal system is malfunctioning, it is a public health hazard and it is located too close to a stream and public well. Further, they contend that Mr. Payne has not complied with the conditions of the

Permit.

This hearing was limited to DNREC's Motion to Dismiss which asserted that the appeal was not timely filed. DNREC's exhibit 1 showed that the Swifts filed their appeal 22 days after receipt of the notification letter from Gerald L. Esposito, a DNREC Division Director. The Swifts' exhibits showed that they had continually objected to the Permit and Mr. Swift testified that he had made his objections known to DNREC by telephone and by letter.

Swift exhibit 1 is a letter dated January 10, 1994, from Gregory Swift to Rodney Wyatt, a Program Manager at DNREC, which objected to any extension of the original permit, which expired January 15, 1994. Mr. Wyatt responded by letter dated February 8, 1994 which stated that New Castle County intended to resolve the Yorklyn sewer problem through a connection to the public sewer. Therefore, DNREC issued a Permit allowing the use of the existing system at Frog Hollow, with some minor modifications as it believed this action to be "in the public interest." Mr. Wyatt's February 8 letter also stated that Mr. Swift may appeal the issuance of the Permit to the Director of the Division of Water Resources. The Swifts were not informed that they had an immediate right to appeal the issuance of the Permit to the Board. Mr. Wyatt's letter did state that the Swifts may appeal to the Board in the future if they disagree with the decision of the Division Director.

The Swifts responded by letter dated February 28, 1994 to Gerard Exposito, Division Director, which they described as "a

notice of appeal of your division's decision to extend the temporary permit...." The last paragraph that they are "very anxious to have this issue resolved." Mr. Esposito interpreted the Swifts' letter as a request for a Director's Review, which he conducted and then notified the Swifts by letter dated March 7, 1994 that the temporary issuance of the Permit was proper. This letter indicated the Swifts may appeal this decision to the Board; the letter was delivered by certified mail to the Swifts on March 14, 1994. Their appeal to this Board was filed by telecopy on April 5, 1994.

FINDINGS OF FACT

1. The Swifts appealed the issuance of the Permit within 20 days by letter dated February 28, 1994 to Mr. Gerald Esposito of DNREC, as instructed by Mr. Wyatt's February 8, 1994 letter.

2. The Swifts were not informed in Mr. Wyatt's letter that they had the right to an immediate appeal to this Board.

3. Following receipt of the denial of their appeal to Mr. Esposito, the Swifts filed their appeal with the Board 22 days later.

CONCLUSIONS OF LAW

Delaware law authorizes appeals to the Board within 20 days. "Any person whose interest is substantially affected by any action of the Secretary may appeal to the...Board within 20 days after receipt of the Secretary's decision or publication of the decision." 7 Del. C. §6008(a). Traditionally the Board has held that this 20 day appeal period is jurisdictional and therefore

the Board may not address appeals filed after this deadline. See In Re Appeal of John Pearson, EAB Appeal No. 92-01. Mr. Swift has argued that the statute uses the word "may" which implies permissiveness and therefore the deadline should not be absolute. However, the statute does contain the 20 day period which would be relegated to surplus language under Mr. Swift's interpretation. Statutes should be construed to give effect to all language added by the General Assembly. Matter of Estate of Smith, Del. Ch., 467 A.2d 1274, 1280 (1983). Thus, § 6008(a) should be interpreted to require appellants who choose to appeal to file within the 20 day deadline. However, the statute does not describe how an appeal is perfected. This information is contained in the Board's regulations which are provided upon request.

The statute also authorizes appeals from "any action of the Secretary." Here, the Permit decision was made by Bruce Patrick, a DNREC employee. "Secretary" is defined in 7 Del. C. § 6002(21) as the Secretary of DNREC "or his duly authorized designee." The Board assumes that Mr. Patrick, was authorized to execute the Permit and therefore the issuance of the Permit constitutes action of the Secretary which may be appealed to this Board.

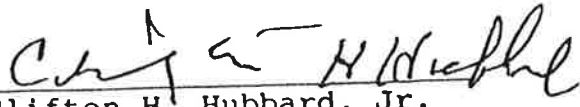
Once the Permit was issued, the Swifts responded within 20 days of notification by letter of appeal to Mr. Esposito, in response to the instructions provided by DNREC regarding appeals. DNREC stipulated that Mr. Swift was erroneously informed that he had to follow the DNREC Director's review, instead of informing him of the Board appeal option. It is reasonable to believe

that, if Mr. Wyatt's February 8 letter had notified the Swifts of the Board appeal option, they would have filed a timely appeal to this Board. We consider this situation akin to Riggs v. Riggs, Del. Supr., 539 A.2d 163 (1988), where misleading action by court personnel was not held against appellants. Their appeal was accepted in the interests of justice. Untimely appeals may only be excused by exceptional circumstances not attributable to appellants or their attorneys. Id. Here, DNREC erred by providing the Swifts with incomplete appeal information. DNREC provided notification of the right to an internal appeal, but failed to describe the option of an immediate appeal to the Board. DNREC did not provide the Board with a copy of the Swift appeal or ask the Swifts to contact the Board to discuss other appeal options. We do not believe that appellants should suffer when an agency provides misleading or inaccurate information.

DNREC argues that the Board's actions in accepting this appeal may make every letter written to DNREC constitute an appeal to the Board. While we believe that public policy entitles appellants, especially *pro se* appellants, to receive the benefit of the doubt, this decision should not lead to mass confusion or substantially lessen the finality contained in the 20 day deadline. Here, the Swifts stated their desire to appeal orally and in writing and they notified DNREC in writing of their desire to appeal the Permit within 20 days of issuance. Under this factual scenario, the Swifts have substantially satisfied the § 6008(a) appeal deadline.

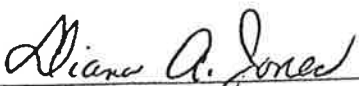
CONCLUSION

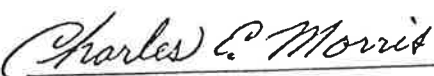
Therefore, for the foregoing reasons, the Board denies DNREC's Motion to Dismiss and concludes that this appeal was timely filed.

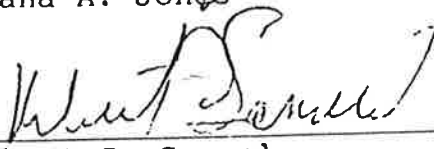

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DATE: July 26, 1994