

BEFORE THE ENVIRONMENTAL APPEALS BOARD
FOR THE STATE OF DELAWARE

CITY OF REHOBOTH,)	
)	
Appellant,)	Appeal No. 98-10
)	
v)	
)	
SECRETARY OF DEPARTMENT OF)	
NATURAL RESOURCES & ENVIRONMENTAL)	
CONTROL, STATE OF DELAWARE,)	
)	
Agency-below,)	
Appellee.)	

FINAL ORDER AND DECISION

Walter W. Speakman, Jr., Esq., of Brown, Shiels, Beauregard & Chasanov 108 E. Water St., P.O. Drawer F, Dover, DE 19903, Richard A. Penna, Esq., Richard G. Kozlowski, Esq., and Sam Kalen, Esq., of Van Ness Feldman, P.C., 1050 Thomas Jefferson St., N.W. Seventh Floor, Washington, D.C. 20007, Attorneys for Appellant City of Rehoboth.

Kevin P. Maloney, DAG, Department of Justice, State of Delaware, 820 N. French St., 6th Flr., Wilmington, Delaware 19801 Attorney for the Secretary.

Before Chairman Clifton H. Hubbard, Jr., Joan Donoho, Robert S. Ehrlich, and Robert I. Samuel, comprising a quorum of the Environmental Appeals Board. Joelle P. Hitch, Deputy Attorney General for the Environmental Appeals Board.

The Environmental Appeals Board (hereinafter the "Board") scheduled a hearing on the above captioned appeal for April 27, 1999. The Appellee, Department of Natural Resources and Environmental Control, (hereinafter "DNREC") filed a Motion to Dismiss/Stay the Appeal which the City of Rehoboth (hereinafter "Rehoboth") opposed. The Appellant, through Walter S. Speakman, Jr., Esq. filed three Motions for Pro Hac Vice Admission as well. Both parties were given the opportunity to brief the Motion to Dismiss/Stay for the Board. At the hearing, the Board also considered a similar motion filed in EAB Appeal number 98-09 regarding the Town of Georgetown. The Board met on April 27, 1999, to consider the motions and responses without oral argument from the parties. The following is the Order of the Environmental Appeals Board.

STATEMENT OF THE CASE

On December 21, 1998, the Mayor of Rehoboth Beach, Samuel R. Cooper, filed Rehoboth's Statement of Appeal with the Environmental Appeals Board appealing the Secretary's Order No. 98-W-0044 regarding Total Maximum Daily Loads (TMDLs) for Indian River, Indian River Bay and Rehoboth Bay, Delaware. On March 24, 1999, the City of Rehoboth filed three Motions for the Pro Hac Vice Admission to the Delaware Bar of Richard G. Kozlowski, Esq., Sam Kalen, Esq., and Richard A. Penna, Esq.. DNREC did not oppose the Motions for Pro Hac Vice Admission.

The City of Rehoboth filed this appeal challenging the TMDL Regulation and specifically the requirement that "all point sources which are currently discharging into the Indian River, Indian River Bay and Rehoboth Bay and their tributaries shall be eliminated systematically". (TMDL Regulation Article 1). Rehoboth asserts it is substantially affected by the TMDL Regulation and is authorized pursuant to 7 *Del. C.* § 6008 to file this appeal.

DNREC has filed a Motion to Dismiss/Stay the appeal arguing 1) the Board lacks jurisdiction

over an appeal of DNREC's regulations, 2) the Board should defer to the Superior Court for its ruling on the issue of jurisdiction since an identical appeal filed by Rehoboth is pending before the Superior Court, 3) the City of Rehoboth lacks standing to bring the appeal and 4) the appeal is not ripe for adjudication.

SUMMARY OF FACTS AND ARGUMENTS

Arguments were presented through the motion and the filing of briefs by each party. The Board did not request oral argument. DNREC argues 7 *Del.C.* § 6008(c) was impliedly repealed through the revision of 29 *Del.C.* § 10161(b) of the Administrative Procedures Act (APA). The APA provides for judicial review of regulations and thus, DNREC argues it is in conflict with section 6008(c). DNREC asserts that as a result of this conflict the APA must prevail citing *Green v. County Council of Sussex County*, Del. Ch. 415 A.2d 481 (1980) and *State Department of Labor v. Minner*, Del. Supr., 448 A.2d 227 (1982).

DNREC further asserts that the Board should stay any consideration of the appeal since the Appellants filed an identical action in Superior Court for a declaratory judgment as to the proper forum for this appeal.

Assuming the Board accepts jurisdiction, DNREC further argues the City of Rehoboth has not been substantially affected under *Oceanport Ind. v. Wilmington Stevedores*, Del. Supr., 636 A.2d 892 (1994) and *Assoc. Of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150 (1970) since Rehoboth has not suffered an "injury in fact". DNREC asserts Rehoboth cannot allege an injury which is "concrete" or "particularized" or "actual" or "imminent" as required by *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). DNREC argues Rehoboth's rights can be adequately protected through appeal should they object to the NPDES permit. DNREC argues the City of Rehoboth has

no means by which to measure any injury suffered until the NPDES permit is issued.

Lastly, DNREC argues the issue is not ripe for adjudication because the NPDES permit has not yet been issued and Rehoboth may not disagree with the terms of the permit. DNREC asserts the TMDL is simply a principle to be applied and that it does not bind DNREC to a particular method or timetable to eliminate Rehoboth's point source.

The City of Rehoboth argues there is no "irreconcilable conflict" between the APA and 7 *Del.C.* § 6008 therefore, the Board has jurisdiction. In support for this position, Rehoboth cites *Darby v. Cisneros*, 113 S. Ct. 2539 (1993). Rehoboth argues a choice of forum is appropriate and the Court's interpretation of section 10 (c) of the Federal APA in *Darby* supports such a conclusion.

The City of Rehoboth further argues the "whereas" clauses accompanying the passage of Senate Bill No. 476 directly refute DNREC's argument. The clauses state, in part, "WHEREAS, the Environmental Appeals Board has been granted broad jurisdiction to hear appeals of any action by the Secretary, including the adoption of regulations; and".

Neither party offers any legal support for their position concerning the pending appeal in Superior Court of the exact same action. Unlike the Town of Georgetown, the City of Rehoboth did not represent that it would dismiss its appeal presently pending in the Superior Court should this Board agree to hear this appeal.

The City of Rehoboth argues it has standing to pursue this appeal because it is a "point source" discharger and has an interest in regulations regarding such. Rehoboth argues it meets the test in *Gannett Co., Inc. v. State*, Del. Supr. 565 A.2d 895, 897 (1989), in that it can claim an injury-in-fact and the interest sought to be protected is within the zone of interest to be protected or regulated by the statute. Rehoboth argues that the TMDL regulation will "guide DNREC in both

the Pollution Control Strategy and in upcoming NPDES permitting proceedings" regarding their Waste water Treatment Plant. (WTP) (Rehoboth Br. at 8) As a result, they are subject to the regulation through the future issuance of permits. The requirement to "eliminat[e] systematically" in the TMDL will be enforced through the permits subsequently issued for their WTP.

Lastly, Rehoboth asserts the issue is "ripe" for adjudication as it is an appeal of a regulation. Such an appeal becomes "ripe" upon the adoption of the regulation by the Secretary as 7 *Del.C.* § 6008 requires an appeal must be filed within 20 days of its adoption.

CONCLUSIONS OF LAW

1. The Board concludes it has jurisdiction to hear this appeal pursuant to 7 *Del.C.* § 6008. Section 6008 (a) states "[a]ny 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". (Emphasis added) The language in section 6008 (a) clearly established that a party has the option to file an appeal before the Board. The statute does not mandate an appeal be heard before the Board. Similarly, 29 *Del. C.* § 10141 of the APA states "[a]ny person aggrieved by and claiming the unlawfulness of any regulation may bring an action in the Court for declaratory relief." (Emphasis added) In *Green v. County Council of Sussex County*, Del. Ch., 415 A.2d 481 (1980), the two statutes did not directly conflict, however required additional formalities and advertising in order to meet the requirements of both statutes. In *State Department of Labor v. Minner*, Del. Supr., 448 A.2d 227 (1982), there was an "irreconcilable conflict" between the two statutes regarding the time for filing the appeal and who is entitled to file such an appeal. The Court held, "to the extent the two statutes at issue conflict, [the APA] supersedes § 3344; otherwise they will be construed together." *Minner* at 229.

In reading the two statutes together, the Board concludes that a substantially affected party may appeal either to the Board or to Superior Court. The Board does not believe this is an "irreconcilable conflict" under *Green*. The Board asserts the doctrine of primary jurisdiction can be exercised by the Superior Court in those matters appealed to the Court in the first instance which may require further administrative review.

The doctrine of primary jurisdiction "comes into play when a claim is originally cognizable in a court of law or equity but referral to an agency competent to rule preliminarily on issues which fall within its regulatory powers is authorized. In such situations, proceedings before a court are merely suspended pending referral of appropriate issues to such an administrative body." *Webb v. Diamond State Telephone Company*, Del. Ch., 237 A.2d 143, 145 (1967). Through this doctrine, the Court may refer matters back to the Board for review prior to a hearing before the Court.

In addition to this doctrine, the parties have a right to appeal the Board's decision to the Superior Court pursuant to 7 *Del.C.* § 6009. The purpose of the APA to "standardize the procedures and methods whereby certain state agencies exercise their statutory powers . . ." is maintained through this further appeal process to the Court. This appeal process is consistent with the *Minner* decision supporting the goal of replacing previous non-uniform regulation with a uniform statewide system.

2. The City of Rehoboth has an identical appeal presently pending in the Superior Court. No doubt, the City of Rehoboth would likely follow the Town of Georgetown's representation and dismiss their Superior Court appeal should the Board accept jurisdiction of the appeal before it. The Board accepts jurisdiction, however, the fact presently before the Board is that the identical action with the identical issues is presently pending before the Superior Court. This Board will not

entertain this appeal while an identical appeal is pending before the Court. In the interest of judicial economy and based on the authority of the Superior Court over the decisions of the Board, the Board has decided to Stay the appeal until the Superior Court appeal is resolved.

3. The Board concludes the City of Rehoboth has standing to bring this appeal. In *Oceanport Ind. v. Wilmington Stevedores*, Del. Supr., 636 A.2d 892 (1994), the Supreme Court adopted the test in *Assoc. Of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150 (1970). The decision in *Oceanport* sets out the test for "substantially affected". Rehoboth must first show "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." The invasion as defined by *Oceanport* must be "1) concrete and particularized, and b) (sic) actual or imminent, not conjectural or hypothetical". *Oceanport* Del. Supr. 636 A.2d 892, 903 (1984) *citing* 112 S. Ct. at 2136.

Rehoboth must also show an "actual connection between the injury and the conduct complained of -- the injury has to be 'fairly . . . trace [able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Oceanport* at 903. The third part of the test requires that "it must be likely that the injury will be redressed by a favorable decision, rather than merely speculative". *Id.* at 903.

Rehoboth has asserted, and DNREC has not denied, that they are one of eleven identified "point source" dischargers in the state. The adoption of the TMDL, although not presently requiring Rehoboth to take any action, does "set a limit on the amount of specific pollutants that can be discharged into a water body and still protect water quality". (DNREC Op. Br. p. ii) Although the permit requirements are not yet "concrete and particularized" the terms of the TMDL regulation are and the issuance of a permit under this regulation will be "actual and imminent".

The Board has determined that through the adoption of the regulation there is an actual connection between the injury and the conduct complained of and the injury is fairly traceable to the challenged action. As such, the Board has determined the City of Rehoboth is substantially affected by the adoption of the Secretary's Order No. 98-W-0044 regarding Total Maximum Daily Loads (TMDLs) for Indian River, Indian River Bay and Rehoboth Bay, Delaware.

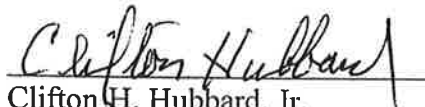
4. The Board agrees with the City of Rehoboth that the appeal was "ripe" upon its adoption by the Secretary. Under 7 *Del.C.* § 6008, an appeal must be filed within 20 days of its adoption.

WHEREFORE, the Motions for Pro Hac Vice Admission appear to be in order and there being no opposition by DNREC, they are hereby GRANTED.

WHEREFORE, since the identical appeal and issues are presently pending before the Superior Court, the Motion to Stay filed by DNREC is hereby GRANTED. The appeal of the City of Rehoboth EAB No. 98-10 shall be Stayed pending resolution of the appeal presently pending in Superior Court on the identical issues.

IT IS SO ORDERED.

The following Board members concur with the decision in its entirety.


Clifton H. Hubbard, Jr.
Chairman


Date

Environmental Appeals Board
Appeal No. 98-10

Joan Donoho
Joan Donoho,
EAB Board Member

5/19/99
Date

Environmental Appeals Board
Appeal No. 98-10



Robert I. Samuel
EAB Board Member

05/03/1999
Date

Environmental Appeals Board
Appeal No. 98-10

The following Board members concur with the decision regarding arguments 1, 3, & 4, however dissent regarding argument 2.

Robert Ehrlich
Robert S. Ehrlich
EAB Board Member

4/30/99
Date

