BEFORE THE ENVIRONMENTAL APPEALS BOARD

FOR THE STATE OF DELAWARE

WILLIAM F. ZAK,	)	
	)	
Appellant,	)	
	)	
v.	)	Appeal No. 2008-08
	)	
ACTING SECRETARY DAVID SMALL and the DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL,	)	
	)	
Appellees.	)	

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 March 10, 2009, 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: Nancy J. Shevock (Chair), Gordon E. Wood, Stanley Tocker, Ph.D, Harold Gray, Sebastian LaRocca, and Michael Horsey. No Board Members disqualified themselves or were otherwise disqualified; however, Board Member Dean Holden did not attend the hearing or otherwise participate in this matter in any capacity. Deputy Attorney General Frank N. Broujos represented the Board.

Appellant William F. Zak ("Appellant") appeared *pro se* in this matter. Deputy Attorney General Robert F. Phillips represented Appellees Delaware Division of Natural Resources and Environmental Control of the State of Delaware ("DNREC") and Acting

DNREC Secretary David Small ("Secretary").[1] Timothy Jay Houseal, Esquire, represented Permittee Indian River Power, LLC ("Indian River Power").[2]

STATEMENT OF THE CASE AND PROCEEDINGS

On March 19, 2008, Indian River Power submitted an amended application to the Solid and Hazardous Waste Management Branch ("SHWMB") within DNREC's Division of Air and Waste Management ("DAWM") requesting the modification of its existing Solid Waste Management Facility Permit (Permit No. SW-07/01) to construct and operate an industrial landfill (referred to as Phase II, Cells 1 & 2) adjacent to the existing industrial landfill (referred to as Phase I) for the continued disposal of coal combustion by-products (commonly referred to as "coal ash") generated at its power generating station located at 29416 Power Plant Road, Millsboro, Sussex County, Delaware (the "Permit Application"). The proposed Phase II landfill would replace Indian River Power's existing Phase I landfill, which would be closed once it has reached its capacity.

A public hearing was conducted by DNREC Hearing Officer Robert P. Haynes (the "Hearing Officer") on June 26, 2008 to solicit and consider public comment on the Indian River Power's Permit Application (the "Public Hearing"). Following that hearing, the Hearing Officer prepared and submitted a report dated August 8, 2008 (the "Hearing Officer's Report) to the Secretary, setting forth the background and procedural history of

[1] For purposes of this Decision and Order, Appellees David Small and DNREC are collectively referred to as "DNREC" or "Appellee". On April 2, 2009, subsequent to the March 10th hearing, Collin O'Mara was confirmed by the Delaware State Senate as DNREC Secretary.

[2] EAB Regulation 5.0 "Hearings Before the Board", Section 5.8 states, in part: "Following opening statements, each party shall have an opportunity to produce evidence in support of such party's position. The appellant(s) shall produce evidence first followed by [DNREC] and then followed by the Permittee if any." It follows, therefore, that Indian River Power, as Permittee, should be considered a "party" in this proceeding for purposes of its motion to dismiss and presenting evidence and argument in support of the Secretary's Order.

the Permit Application, discussion and reasons, and recommended findings and conclusions regarding the issuance of the requested permit.

The Secretary issued Order No. 2008-A-0037 (the "Secretary's Order") on September 4, 2008 (with an effective date of September 4, 2008) regarding the Permit Application. The Secretary's Order incorporated the Hearing Officer's Report and accepted the Hearing Officer's recommendations, and approved the Permit Application and the issuance of the final permit modification for the construction and operation of Phase II consistent with those recommendations.

On September 24, 2008, Appellant, *pro se*, filed a timely notice of appeal of the Secretary's Order with the Board. The appeal, in essence, challenged the legality and reasonableness of the Secretary's Order approving the issuance of the requested permit modification.

Prior to the March 10, 2009 hearing on this matter and pursuant to a schedule stipulated to by the parties, pre-hearing (and potentially case-dispositive) motions were filed by DNREC and Permittee Indian River Power. Specifically, DNREC filed a "Motion to Dismiss" on February 17, 2009 and Indian River Power filed a "Motion to Dismiss" on February 20, 2009. Both DNREC and Indian River Power contend in their respective motions to dismiss that Appellant lacks standing under statutory requirements and applicable case law to pursue his appeal and that said lack of standing serves as the basis for the Board's dismissal of the appeal.

Thereafter, on February 27, 2009, Appellant filed a combined responsive pleading to both motions. Neither DNREC nor Indian River Power filed a reply to Appellant's

combined response and the parties agreed that the motions to dismiss would be heard and considered by the Board at the March 10, 2009 hearing.

MATTERS BEFORE THE BOARD

Prior to the hearing of evidence and argument on the merits of the appeal, the Board considered Indian River Power's Motion to Dismiss and DNREC's Motion to Dismiss. The Board also considered Appellant's written response to the motions to dismiss. Indian River Power and DNREC presented oral argument on their respective motions (and in favor of dismissal), followed by evidence and oral argument by Appellant in opposition to the motions (and in opposition to dismissal).

A. Indian River Power's Motion to Dismiss

In its motion, Indian River Power requests that the Board dismiss Appellant's appeal. Indian River Power 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)[3] to pursue his appeal. Specifically, Indian River Power argues that the Appellant is not "substantially affected" by the Secretary's Order, as required by the express statutory language in §6008(a)[4] as interpreted by the Delaware Supreme Court in the case of *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*[5] because Appellant has not suffered an "injury-in-fact". Indian River Power contends that, to invoke

[3] 7 *Del.C.* §6008(a) states, in pertinent 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." *See also* Environmental Appeals Board Regulation 102(c), which states: "Pursuant to 7 *Del. C.* §6008, any person whose interest is substantially affected by any action of the Secretary may appeal to the Environmental Appeals Board within twenty (20) days after the Secretary has announced the decision."

[4] All statutory section citations in this Decision and Final Order refer to Chapter 60 (Environmental Control) of Title 7 (Conservation) of the Delaware Code, unless otherwise noted.

[5] 636 A.2d 82 (Del. 1994)

standing before the Board, the Appellant's injury cannot be an injury or harm suffered or shared by the public generally. Rather, the Appellant must prove that his injury is "concrete and particularized" and "actual or imminent" and not "conjectural or hypothetical", as required by the standard set forth in *Oceanport Industries*. Indian River Power distinguishes this stricter standard from the broader, more generalized standard (*i.e.*, access) provided to the general public at the public hearing stage of the permit process. Indian River Power contends that the Appellant has failed to satisfy his burden of proof to establish standing and therefore his appeal must be dismissed.

B. DNREC's Motion to Dismiss

In its motion, DNREC also requests that the Board dismiss Appellant's appeal. DNREC argues in its motion and before the Board that the Appellant carries the burden of proving that he has standing to bring this appeal but Appellant failed to establish that he has been "substantially affected" by the Secretary's Order, as required by §6008(a). DNREC contends that the Appellant is, in fact, advocating the general interests of Delaware citizens and did not allege and cannot demonstrate any injury to himself, to his property or to any other legal interest. Thus, DNREC argues that under the *Oceanport Industries* standard, Appellant lacks standing to pursue his appeal.

C. Appellant's Combined Response to DNREC and Indian River Power's Motions to Dismiss

Appellant requests, in effect, that the Board deny the DNREC and Indian River Power Motions to Dismiss. Appellant acknowledges that his Notice of Appeal focused initially on civic interests involved with the public health. Before the Board and in his written response to the motions to dismiss, however, Appellant argues, in the form of a sworn statement, that he has suffered injury to himself, his property and other legally

cognizable interests and therefore he has established standing in this matter. He argues his interests are specific, unique and particularized, and are essentially three in nature: (1) recreational (Appellant contends that his ability to sail and kayak in the Inland Bays is restricted by the heavy metal contamination in the waters off Burton Island at 34 of 34 testing sites from the Indian River Power landfills); (2) financial (Appellant contends that the risk and danger of a flood event contaminating the Inland Bays would have a direct and adverse effect on tourism to the area generally and on the value of his waterfront property, which lies on a creek flowing into the inland bays and is approximately five miles from the Indian River Power landfill location); and (3) health-related (Appellant contends he is exposed to serious health risks as a result of being exposed to the airborne contaminants blown downwind from the coal ash deposited (and to be deposited) at the Indian River Power landfills for at least half the year).

In addition, Appellant challenges Indian River Power's contention that the public's right to be heard was at the public hearing stage, rather than before the Board. Appellant contends that numerous questions and issues raised by the public at the public hearing stage remained unanswered, as acknowledged by the Hearing Officer in his report to the Secretary.

Finally, Appellant contends that the purpose of this Board is to review public policy in terms of its advisability for public health.

At the conclusion of argument by the parties, the Board entered into executive session as permitted by §6008(a)[6] to deliberate on the motions to dismiss. Following deliberations, the Board unanimously granted a motion by Board Member Stanley

[6] Section 6008(a) states, in pertinent part, "[d]eliberations of the Board may be conducted in executive session."

Tocker, Ph.D., to defer its decision on DNREC's Motion to Dismiss *and* Indian River Power's Motion to Dismiss in order to allow Appellant the opportunity to present his case on the merits to provide the Board, in part, with additional facts to assist it in ruling on said motion(s).

PARTIES' POSITIONS AND SUMMARY OF THE EVIDENCE

Prior to the hearing, and in accordance the EAB Regulation 4.0 (Chronology), the Board was provided the Chronology[7] consisting of the record below.[8] In addition, following the deferral of its decision on the motions to dismiss, the Board heard additional evidence and argument from the Appellant on the merits of the appeal. At the conclusion of Appellant's presentation of his case in chief, both DNREC and Indian River Power renewed their respective motions to dismiss, and also moved to dismiss Appellant's appeal on the ground that he did not meet his burden of proof under §6008(b)[9].

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[7] For purposes of this appeal, the Chronology consisted of the (a) Permit SW-07/01; (b) Receipt letter from the Board acknowledging the filing of appeal; (c) Appellant's Statement of Appeal; (d) Secretary's Order 2008-A-0037; (e) Hearing Officer's Report (with exhibits); (f) Public Hearing Transcript; and (g) Indian River Power's Solid Waster Management Facility Permit Application. The parties and the Board were also able to access the entire record before the Secretary, available at *http://www.awm.delaware.gov/SHWMB/Pages/NRGPhaseIIApplication. asp*. In addition, EAB Regulation 5.0 "Hearings Before the Board", Section 5.3 states, in part: "The record before the Board includes the entire record before the Secretary." The entire application "submittal" by Permittee NRG totaled more than 2,700 pages. As the prehearing conference, the parties were informed that all 2,700+ pages were not included in the Chronology sent to the Board and voiced no objections prior to the hearing.

[8] *EAB Regulation* 4.3 states that "[t]he Chronology . . . will be provided to the Board members prior to the hearing."

[9] 7 *Del. C.* §6008(b) states, in relevant part: "The burden of proof is upon the appellant to show that the Secretary's decision is not supported by the evidence on the record before the Board."

A. Appellant's Position and Evidence

Appellant presented no witnesses but did testify on his own behalf. In addition, Appellant introduced and the Board admitted into evidence the following eleven exhibits[10], consisting of the following:

- *Exhibit 1*: Center for the Inland Bays Board of Directors meeting minutes from its September 19, 2008 meeting (referencing the passage of a resolution expressing the Center's opposition to the Secretary's Order);
- *Exhibit 2*: Two maps (Well and Surface Water Intake Map *and* Facility Layout Map) of the Indian River Power generating station and landfills;
- *Exhibit 3*: Set of six tables (Table 3.1-4 (Summary of Groundwater Concentrations in Soil Boring), Table 5.1-4 (Human Health Exposure Point Concentrations in Shoreline and Offshore Sediment Samples), Table 5.2-4 (Identification of Constituents of Potential Ecological Concern in Soil), Table 5.2-5 (Ecological Exposure Point Concentrations in Shoreline and Offshore Sediment Samples), Table 5.2-6 (Ecological Exposure Point Concentrations in Surface Water Samples), and Table 5.2-7 (Ecological Exposure Point Concentrations in Soil Samples)) from the Shaw Environmental Report that was commissioned by DNREC concerning Burton Island;
- *Exhibits 4A and 4B*: Copies of portions of DNREC's Air Quality Management Section Regulation 1105 and Regulation 1106 (respectively);
- *Exhibit 5*: Copy of Section 6.0 (specifically Sections 6.1.1 and 6.1.3.8) of the State of Delaware Regulations Governing Solid Waste;

[10] Per stipulation of the parties, Exhibits 3, 6, 7, 8, 9 and 10 were part of the record before the Secretary. In addition, DNREC and Indian River Power raised various objections to introduction of many of these exhibits, all of which were admitted into evidence by the Board.

- *Exhibit 6*: Copy of the State of Delaware Coastal Zone Permit No. 48P, dated April 28, 1976, issued to Delmarva Power & Light Co. to construct and operate Unit #4 electric power generating unit at the Indian River Power Station near Millsboro (including ash and solid waste disposal);
- *Exhibit 7*: Copy of letter from John Austin dated June 28, 2008 (expressing opposition to Indian River Power's permit modification application);
- *Exhibit 8*: Copy of email from John Austin to DNREC Engineer Jae-Soo Chang dated May 16, 2008 (requesting a public hearing on Indian River Power's permit modification application);
- *Exhibit 9*: Copy of letter from Steve Callanen, Chairman of the Energy Subcommittee of the Southern Delaware Group of the Sierra Club;
- *Exhibit 10*: Memorandum dated August 1, 2008 to Hearing Officer Robert Haynes from DNREC Engineer Jae Soo Chang (responding to the Hearing Officer's request for technical assistance to address issues raised at the Public Hearing); and
- *Exhibit 11*: Transcript prepared by Appellant of his testimony before the Board.

Appellant relied upon and cited to these exhibits in his testimony in support of his contention that he has standing to bring his appeal, as well as his contention that the Secretary's Order is arbitrary and capricious, violative of State regulations, and nonresponsive to many of the public's questions and issues presented at the public hearing. Appellant stated he disputes the Secretary's claim in the Order that the Phase II landfill represents no "undue threat to the environment or public health." Appellant contends that issues pertaining to the existing Phase I landfill are relevant and properly

before the Board because Phase II will pose the same problems as Phase I, despite the permit requirements for a multi-layered liner and leachate collection system.

Specifically, Appellant testified regarding contamination from incidents at coal ash storage facilities in Tennessee and Maryland and the resulting potential public health risks, as well as the related costs to taxpayers. He noted that the New York Times reported that in 2007 the Federal Environmental Protection Agency ("EPA") identified 63 sites in 26 states where water was contaminated by heavy metals from coal ash storage sites. He also noted the EPA is currently addressing issues regarding coal ash storage.

Appellant also questioned DNREC's failure to designate the Indian River Power's coal ash landfills as hazardous waste sites and reliance on existing federal regulations, in light of the possibility that the EPA may regulate coal ash storage in the future. He stated that the Secretary's decision on the Permit Application should have been delayed pending a decision by the EPA (or further regulation by DNREC) regarding its policy with respect to the designation of coal ash as hazardous waste, primarily to avoid possibility of protracted litigation or the grandfathering of the Phase II facility, allowing pollution for decades to come.

Appellant testified that pollution levels at the Indian River Power generating station account for 47% of the industrial pollution in Delaware, citing a "Toxic Release Inventory" and noting that levels have "piled up" at the Indian River facility for the past 50 years. Appellant stated Phase II, while required to be lined and have a closed leachate collection system for recycled contaminated run-off (unlike Burton Island and Phase I), will not be required to be covered on a daily basis or to be air-monitored for wind blown particulates.

Appellant stated that public health and local ecological dangers posed by coal ash storage are threefold: (1) toxic infiltration of ground water and the Inland Bays, (2) major storm event and flooding; and (3) wind dispersion of particulates the landfills and the sedimentation pond at Phase I. Appellant cited the Shaw Report as reporting heavy metal contamination in 34 of 34 on-shore sediment samples, off-shore sediment samples and island soil samples, as well as warning of ground water contamination risk of the Inland Bays.

Appellant testified as to flooding dangers and the Phase I and Phase II locations' proximity to the flood plain. He further stated the risks of flooding that could result from a breach of the sedimentation pond's berms and the overflow of those berms into the surrounding creek and eventually into the Inland Bays during a heavy and sustained rain. Appellant noted that the risk of contamination is greater because of improved air emissions from the facility's stacks, resulting in higher levels of mercury in the coal ash disposed in Phase I and to be disposed in Phase II.

Appellant also testified about his concerns regarding particulate emissions from the uncovered coal ash piles in Phase I and Phase II and from evaporation at the sedimentation pond. Appellant stated that there is a requirement to spray down uncovered ash piles when there is blowing dust but there are no daily cover requirements or air monitoring requirements.

Finally, Appellant testified that he believes the Secretary's Order violates DNREC and other State regulations, including Section 7.0 of Regulation 1105 ("Particulate Emissions from Industrial Processing Operations"), Section 6.0 of Regulation 1106 ("Particulate Emissions from Construction and Materials Handling"),

and Sections 6.1.1 and 6.1.3.8 of Regulation 1300 (Solid waste regulation governing industrial landfills).

B. Indian River Power's Position and Evidence

Indian River Power presented no evidence or witnesses. However, in its opening argument and in response to Appellant's argument on the merits (and renewed argument in favor of standing), Indian River Power argues that many of the issues raised by the Appellant in his appeal deal specifically with concerns regarding the Phase I landfill, which was not before the Secretary for approval, and the approval and operation of which is grandfathered under Regulation 2.4.1.2[11] of the State of Delaware Regulations Governing Solid Waste.

Indian River Power contends that the Phase II landfill permit application that was before the Secretary is a permit modification, not a new permit request. Accordingly, under Regulation 4.1.7.3[12] of the State of Delaware Regulations Governing Solid Waste, only issues regarding the permit modification (*i.e.*, Phase II) were properly before the Secretary and are now properly before the Board. Indian River Power also contends that the permit conditions approved by the Secretary for the Phase II landfill are fully compliant with (and exceed) all existing State of Delaware Solid Waste Regulations.

Indian River Power argues that the Board should not consider any issues raised by Appellant regarding the existing (Phase I) landfill because that site was approved in the

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[11] Regulation 2.4.1.2 (Scope and Applicability/Compliance/Existing Facilities) states: "Facilities currently operating under a permit which does not require a liner and/or a leachate detection system will not be required to install a liner or leachate detection system in closed or currently active areas for the purpose of coming into compliance with these regulations."

[12] Regulation 4.1.7.3 (Permit Requirements and Administrative Procedures/General Provisions/ Modification of Permit) states: "Public notice and opportunity for hearing in accordance with paragraph 4.1.2 of this Section shall be accomplished for all major modifications proposed for the permit. In the event a hearing is requested or deemed necessary by the Secretary, only the permit conditions subject to the modification shall be reopened for public comment."

initial permit granted 30 years ago and those permit conditions were not before the Secretary for review. Similarly, Indian River Power also agues that the Board should not consider any issues or concerns regarding the power generating plant itself. Indian River Power notes that the "siting" of the landfills (Phase I and Phase II) was approved when the initial permit was approved and was not an issue before the Secretary and therefore is not before the Board. The new Phase II (as a new cell) falls under the modification of the *existing* solid waste permit.

Indian River Power objected generally to the Appellant's testimony and various exhibits regarding the alleged violations of DNREC Regulation 1105, noting the permit approved by the Secretary's Order is a solid waste permit, not an air quality permit.

C. DNREC's Position and Evidence

DNREC presented no evidence other than one witness. In its opening argument and in response to Appellant's argument on the merits, DNREC argued that Appellant bears the burden of proving that the Secretary's Order was not reasonable and not supported by evidence in the record. DNREC contended Appellant cannot meet that burden because the evidence will show that the Secretary's Order granting the issuance of the modified permit (SW-07/01) was adequately supported by the evidence before the Secretary; is adequately protective of the environment; and is compliant with applicable State of Delaware regulations. DNREC further stated that Phase I is grandfathered under Regulation 2.4.1.2 and that it is undisputed that Phase II complies with all application regulations, as required by Regulation 2.4.2[13]. Finally, DNREC argued that the Board should not be swayed by the concerns and issues raised by Appellant regarding the

[13] Regulation 2.4.2 (Scope and Applicability/Compliance/New facilities and expansions of existing facilities) states "All new facilities and all expansions of existing facilities shall comply with the provisions of these regulations."

existing (Phase I) landfill because those matters were not before the Secretary for review or decision.

DNREC objected to the Appellant's testimony and exhibits regarding the alleged violation of DNREC Regulations 1105 and 1106, questioning whether those regulations are applicable to the Phase II landfill.

DNREC's only witness was Brian Ashby, an Environmental Program Manager at DNREC, who testified as to his knowledge of air quality monitoring conducted by DNREC in areas (namely Millsboro) surrounding the Indian River Power's generation station.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After deliberation and careful review of the arguments of the parties, their written submissions and the evidence presented, the Board grants, by a vote of 5 to 1, DNREC's and Indian River Power's motions 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 these motions to dismiss (for lack of standing), the additional motions to dismiss made by DNREC and by Indian River Power at the conclusion of Appellant's case in chief, on the grounds that Appellant failed to meet his burden of proof under §6008(b) (that the Secretary's decision is not supported by the evidence on the record before the Board), are rendered moot and therefore need not be decided by the Board.[14]

[14] 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.

DNREC's and Indian River Power's motions to dismiss are to be treated as motions for summary judgment, because matters (*i.e.*, evidence) outside the pleadings were presented to the Board by the Appellant. Accordingly, the evidence is to be viewed by the Board in a light most favorable to the nonmoving party (here, the Appellant) in making its decision.

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. (*see* fn.3, *supra*). 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." (Emphasis added).

In essence, the dispositive issue on these motions 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, Inc.*[15], 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).[16] Once a permit has

[15] 636 A.2d 892 (Del. 1994)

[16] 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

issued, as Permit SW-07/01 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*[17], 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*[18], 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 Secretary's Order). Appellant's evidentiary showing and argument (written and oral) before the Board, however, have 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.[19]

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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."

[17] 2004 WL 440413 (Del. Super. Feb. 26, 2004)

[18] 838 A.2d 1103 (Del. 2003)

[19] The Board has not considered (and cannot consider) arguments and matters raised by Appellant pertaining to the existing Phase I landfill or the siting of the Indian River Power generating station because those matters were not before the Secretary.

Appellant resides at 7 Deerfield Drive, Lewes, Delaware[20], at a Sussex County location approximately 5 miles from the Indian River Power Generating Station (and the site of the existing Phase I industrial waste landfill and the DNREC-approved Phase II industrial waste landfill). His residence is located on a branch of Love Creek, approximately 300-400 yards from the point at which Love Creek flows into the Inland Bays, which are accessible from the site of the Indian River Power Generating Station (and the Phase II landfill).

Appellant utilizes the Inland Bays for recreational purposes. Appellant sails and kayaks on the Inland Bays several times a year, but has not curtailed or ceased that activity in light of his concerns regarding the storage of coal ash at the Indian River Power facility. Appellant presented no evidence that he has suffered (or will imminently suffer) any concrete, particularized injury with respect to his recreational use of the Inland Bays as a result of the Secretary's decision with respect to the Phase II landfill, or any heavy metal contamination in the Inland Bays, if such exists, from the coal storage at the Phase II landfill, or even the Phase I landfill. Thus, it is purely speculative that Appellant's recreational use of the Inland Bays has been or will be adversely impacted by the operation of the Phase II landfill.

Appellant lives "downwind" from the Phase II landfill site and is potentially exposed to windblown particulates from the Indian River Power landfill sites for six months of the year. However, Appellant has not conducted (or requested) any ambient air sampling testing at his home, or modified his HVAC system, or otherwise produced any evidence, data, calculations or air dispersion modeling to show how he has been or

[20] The town of Lewes is used in the Appellant's mailing address but it is undisputed that Appellant does not live within the corporate limits of Lewes.

would be directly impacted or injured by windblown particulates from the coal ash stored at the Phase II landfill, or even that such particulates from the Phase I landfill have actually reached (or were detected at or near) his residence. Any concrete injury that would stem from windblown particulates from the Phase II landfill is speculative, at best. Appellant's contention that he will "continue to suffer personally because those particulates are coming up into my airstream and are blown over my house" is simply not sufficient to prove an injury in fact.

Appellant also testified as to the economic risk he faces as a property owner in close proximity to the Phase II landfill should a flooding event cause contamination in the Inland Bays. As a waterfront property owner, it is reasonable to conclude that Appellant is generally more susceptible to all types of property damage caused by flooding than a property owner inland. While severe flooding invariably (and unfortunately) causes economic loss, no evidence was produced by Appellant to show that the Phase II landfill in a flood event is or will be at heightened risk of breach (other than its proximity to a flood plain) or present other adverse effects. Nor has Appellant produced any evidence to show even the likelihood of "profound" economic consequences caused by the Phase II landfill site on the surrounding resort area, on tourism or on property values (including his residential waterfront property) should a flood event affecting the Phase II landfill site occur. It is mere speculation that a breach of the Phase II landfill would cause, as Appellant contends, severe economic loss. The Board rejects any analogy to the recent Tennessee incident to which Appellant referred in his testimony; that incident involved a different type of coal ash and storage methodology and no evidence was presented by Appellant to show that dry ash (the type to be deposited at the Phase II site) would react

in the same manner in a flooding incident. It is important to note that the statute under which the Permit was issued is intended to regulate environmental degradation, *not* protect economic interests. Thus, Appellant's alleged injury with respect to his property is not within the "zone of interest" to be protected by the statute, as required by *Oceanport Industries*.

In light of the facts alleged in Appellant's Notice of Appeal, the facts alleged in his sworn statement contained in his 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 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 mere concerns regarding environmental problems affecting the public at large. Thus, Appellant has no standing to pursue his appeal and the motions to dismiss are properly granted.

IT IS SO ORDERED, this 8th day of June, 2009.

ENVIRONMENTAL APPEALS BOARD

The following Board members concur in this decision.[21]

Nancy J. Shevock
Chairperson

Date: June 8, 2009

[21] Board Member Stanley Tocker, Ph.D., voted against granting the motions to dismiss and does not concur in the decision of the Board.

Gordon Wood
Board Member

Date: June 3, 2009

Harold Gray
Board Member

Date: 6/4/2009

Environmental Appeals Board
Appeal No. 2008-08 (William F. Zak)

Michael Horsey
Board Member

Date: 6/3/09

Sebastian LaRocca
Board Member

Date: June 3, 2009