

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

<b>JOSEPH AND MARGARET BOOTH,</b>	)	
	)	
<b>Appellants,</b>	)	
	)	
<b>v.</b>	)	<b>EAB Appeal No. 2017-08</b>
	)	
<b>SECRETARY M. SHAWN GARVIN</b>	)	
<b>AND THE DELAWARE DEPARTMENT</b>	)	
<b>OF NATURAL RESOURCES AND</b>	)	
<b>ENVIRONMENTAL CONTROL,</b>	)	
	)	
<b>Appellees.</b>	)	

**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 April 10, 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, Gordon Wood and Guy Marcozzi. No Board Members disqualified themselves or were otherwise disqualified. Deputy Attorney General Kevin P. Maloney represented the Board.

Christopher M. Coggins, Esq. represented the Appellants. Deputy Attorney General Robert F. Phillips represented Appellees Delaware Department of Natural Resources and Environmental Control (“DNREC”) and DNREC Secretary M. Shawn Garvin (“Garvin”).

## **STATEMENT OF THE CASE AND PROCEEDINGS**

Appellants Joseph and Margaret Booth (collectively the “Appellants”) have filed two related appeals with the Board.

The first appeal, EAB No. 2017-08 (“Booth I”), dated June 7, 2017 and marked received by the EAB June 12, 2017, challenges verbal statements made by Appellee Garvin at a meeting that he attended with Appellants at Legislative Hall in Dover on May 17, 2017. At that meeting, Garvin concluded that Appellants do not have a viable “innocent landowner” defense under the Hazardous Substance Cleanup Act, 7 *Del. C.* Chapter 91 (“HSCA”), with respect to their ownership of commercial property located at 11 Railroad Avenue in Georgetown, Delaware (the “Site”). DNREC alleges that the Appellants operated a dry cleaning business at the Site.

In their second appeal, EAB No. 2017-13 (“Booth II”), Appellants challenge Secretary’s Order No. 2017-WH-0027 dated October 31, 2017 (the “Secretary’s Order”), which found Appellants “are potentially responsible parties and that they have violated HSCA and [DNREC] Regulations.” This second appeal is not resolved by this Opinion and Order and was not addressed at the April 10, 2018 hearing, and remains pending on the Board’s docket for a future hearing.

## **MATTERS BEFORE THE BOARD**

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

### A. DNREC 's Motion to Dismiss

In its Motion to Dismiss dated June 16, 2017, DNREC requests that the Board dismiss Appellant's appeal. DNREC argues in its motion and before the Board that the Board does not have jurisdiction to hear the appeal because of the statutory requirement of timeliness set forth in 7 *Del. C.* § 6008(a). Specifically, DNREC argues that Appellants did not timely file their Appeal, as required by the express language in § 6008(a) which requires that "[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."

DNREC also argues in its Motions to Dismiss that the Board lacks subject matter jurisdiction over the appeal because a verbal statement from the Secretary is not an appealable "action of the Secretary" as that phrase is used in § 6008(a). DNREC claims that the fact that a verbal statement from the Secretary is not an appealable "action of the Secretary" should act independently from the issue of timeliness and should serve as a separate basis to deprive the Board of authority to adjudicate the appeal.

### B. Appellants' Response To DNREC Motion To Dismiss

Appellants request that the Board deny the DNREC's Motion to Dismiss. Appellants<sup>1</sup> filed a Response to DNREC's Motion to Dismiss by letter dated July 5, 2017. In the letter Appellants acknowledge, as they must, that Appeal No. 2017-08 was taken from "a verbal statement from Secretary Garvin" made on May 17, 2017. Appellants go on to state that "at the [May 17] meeting we requested a response in writing." DNREC obliged with a letter to Appellants dated May 23, 2017. Appellants never appealed from their receipt on the May 23 letter.

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<sup>1</sup> The Booths proceeded *pro se* in this matter until Mr. Coggins made his initial appearance at the April 10, 2018 hearing before the Board.

## 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 7 to 0, the Board granted Appellee's Motion to Dismiss, on the basis that the Appellants have failed to meet their burden of proof to establish the timeliness of this appeal. By granting the Motion to Dismiss for lack of timeliness, any additional arguments in support of the Motion to Dismiss made by DNREC on subject matter jurisdiction grounds are rendered moot and therefore need not be decided by the Board.<sup>2</sup>

As noted *supra*, the statutory requirements for timeliness in bringing an appeal before this Board are set forth in § 6008(a) and in the Board's regulations<sup>3</sup>. 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 Appellee's Motion to Dismiss is what action of the Secretary is being appealed and when the Board received the Appellants' Statement of Appeal. Appellants appealed from a verbal statement made by Secretary Garvin on May 17, 2017. Appellants' Statement of Appeal states the following: "[A]t the May 17<sup>th</sup> meeting Secretary Garvin

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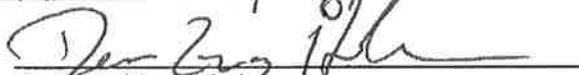
<sup>2</sup> A motion to dismiss based on timeliness is a case dispositive motion because it speaks to the Board's lack of subject matter jurisdiction. Absent a showing of a timely filed appeal by an Appellant, this Board does not have jurisdiction to hear an appeal. The Board's resolution of the Booth I Appeal on timeliness grounds makes it unnecessary to address other arguments advanced by DNREC in support of its Motion to Dismiss.

<sup>3</sup> Board regulation 1.1 provides: "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."

insisted that 'he stands by DNREC employees' position and it is his official decision.' We believe this statement gives us Pursuant [sic] to 7 Del. C. 6008 the ability to appeal the action of the Secretary." Appellants' Statement of Appeal dated June 7, 2017 was received by the Administrative Assistant for the Board on June 12, 2017, which is 26 days after the Secretary's verbal statement. When an appeal is not filed within the statutorily prescribed time period the Board is without jurisdiction to hear the appeal. *See Flaherty & Martin v. DNREC*, EAB Appeal No. 2012-01; *Saliba v. DNREC*, EAB Appeal No. 2002-04; *In re Pearson*, EAB Appeal No. 1992-01.

In light of the facts alleged in Appellants' Statement of Appeal, the facts alleged in their written response to the motions to dismiss, as well as the evidence presented at the hearing, all viewed in a light most favorable to Appellants, the Board finds that the Appellants have not established that they timely filed Appeal No. 2017-08. Appellants' contentions, while articulately stated, were simply too late. Thus, Appellants have failed to establish that the Board has jurisdiction to hear the appeal and the motion to dismiss is properly granted.

IT IS SO ORDERED, this 3<sup>rd</sup> day of July, 2018.

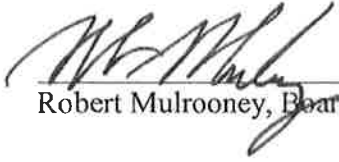
  
Dean Holden, Chairperson

The following six Board members concur in this decision.

Date: \_\_\_\_\_

\_\_\_\_\_  
Robert Mulrooney  
Board Member

Date: 7/5/2018

  
\_\_\_\_\_  
Robert Mulrooney, Board Member

Date: 7/3/18

  
Michael Horsey, Board Member

Date: 7/3/18

Frances Riddle  
Frances Riddle, Board Member



Date: 7/5/2018



Guy Marcozzi, Board Member

Date: July 6, 2018

/s/ Sebastian LaRocca  
Sebastian LaRocca, Board Member

Date:

7/2/18

Gordon Wood  
Gordon Wood, Board Member