

1 DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL
2 ENVIRONMENTAL APPEALS BOARD

3 In re: Delaware) EAB Appeal 2021-07
4 Community Benefits)
5 Agreement Coalition)

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7 Virtual Public Hearing
8 Dial-In Number: 1-408-418-9388
9 Event Number: 2335 771 9802
10 Tuesday, April 12, 2022
11 9:00 a.m.

12 - - -

13 BEFORE: The Environmental Appeals Board
14 Dean Holden, Chairman
15 Frances Riddle
16 Michael A. Horsey
17 Robert Mulrooney

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22 VERITEXT NATIONAL COURT REPORTING COMPANY
23 MID-ATLANTIC REGION
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(ALL ATTENDEES APPEARING REMOTELY)

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1 MR. HOLDEN: Good morning to everybody.
2 Thank you for your patience and time. The purpose of
3 today's Environmental Appeals Board hearing is for the
4 consideration of motions to dismiss an appeal number
5 2021-07. The motions filed by the Department of Natural
6 Resources and Environmental Control, which we'll refer to
7 as "DNREC," and the Diamond State Port Corporation, which
8 we'll call "DSPC," challenge the appellants' standing and
9 ability to prosecute the appeal without legal
10 representation.

11 The appellants timely appealed the
12 secretary's order number 2021-CZ-0019, granting of
13 subaqueous lands, permit number SP-101/20 and DCMP
14 federal consistency certification for the Port of
15 Wilmington, Edgemoor number FC2020.0043, which we'll also
16 call "the order."

17 Appellants contend the secretary's
18 decision was improper. Subsequently, DNREC filed a
19 motion to dismiss requesting a summary board ruling in
20 its favor. Appellant Richardson has provided an email
21 response to the appellees' motion to dismiss.

22 I'll now introduce the board members and a
23 few other individuals. My name is Dean Holden, and I'm
24 the board chairperson. Other board members present today

1 are Ms. Frances Riddle, Mr. Mike Horsey, and Mr. Robert
2 Mulrooney. The board's deputy attorney general is Kevin
3 Maloney, and Mr. John Skadsberg is helping the board
4 today with administrative and other duties. Ms. Carrie
5 Gold is online, our court reporter today. And as spoken
6 earlier, Ms. Devera Scott is representing DNREC.

7 Today's hearing is being held remotely via
8 the Webex videoconferencing platform. With that being
9 said, I ask that participating individuals mute your
10 microphone unless you're actively speaking. If you're
11 having videoconferencing issues, as we have had some this
12 morning, please try to make that known using the chat
13 function or by calling Mr. Skadsberg or texting
14 Mr. Skadsberg at (302) 554-2105. Please also turn off
15 phone ring tones or set them to silent.

16 I might offer to the public the chat
17 function and any verbal interaction today is intended for
18 the parties and so please leave the chat open for those
19 uses.

20 We will conclude the hearing no later than
21 4:30 p.m. We may take a midmorning break. We will take
22 a lunch break if still in session, and possibly other
23 breaks if the hearing runs into the afternoon.

24 The board may deliberate at any time and

1 may do so in executive session as permitted by 7 Delaware
2 Code Section 6008A.

3 Notice of today's hearing was posted on
4 the State of Delaware Secretary of State's public meeting
5 calendar and at the Richardson and Robbins Building, 89
6 Kings Highway in Dover. In addition, public notice of
7 this hearing was published in The News Journal and the
8 Delaware State News.

9 The board is a quasi-judicial body created
10 by the general assembly to hear appeals of decisions of
11 the secretary. The manner in which the board fulfills
12 its duties, responsibilities, including conducting
13 hearings, is established and governed by the Delaware
14 Code, the board's regulations, and case law.

15 The board is required to issue a written
16 decision within 30 days of the conclusion of this matter.
17 Pursuant to 7 Del Code Section 6009A, any person or
18 persons aggrieved by a decision of the board may appeal
19 to the superior court within 30 days of receipt of the
20 hearing opinion.

21 As indicated earlier, DNREC and DSPC have
22 filed motions to dismiss, and so we will move into those.

23 I want to take a moment to offer some
24 housekeeping and other measures. If Ms. Gold has

1 questions, I want her to speak up and make sure we have a
2 clear transcript, a clear recording of this hearing. And
3 any other issues, you can use the chat function. There's
4 a "raise your hand" function in the chat. We will keep
5 an eye on that, and we're going to proceed best can today
6 with the challenges we've had this morning.

7 And so if there are any questions on the
8 housekeeping at this point.

9 MR. MALONEY: This is Mr. Maloney again.
10 I'm sorry. I think I was responsible for a typo in the
11 chairman's introductory remarks. The statute actually
12 provides that the opinion be issued within 90 days. I
13 believe I may have made a mistake and put 30 days in the
14 chairman's opening remarks so it's 90 days after the
15 board's decision.

16 MR. HOLDEN: Thank you, Mr. Maloney. I
17 must have misspoken if I did. You did write 90, thank
18 you. But thank you for the clarification.

19 So with that, Ms. Scott?

20 MS. SCOTT: Thank you. Good morning,
21 Chair Holden and members of the board and Mr. Maloney.

22 DNREC has presented this motion to dismiss
23 in this matter. As you know, the appellants here include
24 an organization and five individuals. And we've filed

1 this motion to dismiss to raise the issues about counsel
2 representation in order to clarify the process, not
3 necessarily to exclude individuals from this hearing.
4 But Delaware law is clear with respect to the
5 organization, the Delaware Community Benefits Agreement
6 Coalition. Delaware law is clear; organizations must be
7 represented by counsel.

8 And to date, Mr. Richardson, who I believe
9 is not a Delaware lawyer, has been the primary
10 spokesperson for the organization and for the five
11 individuals, including himself. So if the organization
12 is going to continue to be an appellant in this matter,
13 then the organization must be represented by counsel.
14 Otherwise, they must be dismissed in this matter.

15 And with respect to the individuals,
16 again, Delaware law doesn't permit a person not licensed
17 in the state of Delaware to practice law to represent
18 other parties. Individuals may represent themselves, and
19 that's also reflected in the EAB regulations, which
20 provide that appellants must appear personally or
21 represented by counsel. Again, Mr. Richardson has been
22 the spokesperson for all the parties to date. We don't
23 object to Mr. Richardson representing himself, but he
24 cannot represent the organization or any other

1 individuals.

2 And the same with the individuals: If
3 those individuals want to participate without counsel,
4 then they must do so on their own behalf. And
5 participating means full participation, participating in
6 correspondence, all of the requirements that are, you
7 know, required by the regulations in terms of providing
8 lists of exhibits and witnesses, participate in filing
9 briefs, and participating in argument. There can't be a
10 spokesperson for the individuals either.

11 So DNREC simply respectfully requests that
12 the board dismiss the organizational appellant as an
13 unrepresented entity and either order that the individual
14 participants participate on their own behalf, fully
15 participate, or dismiss them from the appeal. Thank you.
16 That's all I have.

17 MR. HOLDEN: Thank you, Ms. Scott.

18 Mr. Burton, do you have any follow-up?

19 MR. BURTON: Thank you, Mr. Holden.

20 Again, William Burton of Barnes &
21 Thornburg on behalf of Diamond State Port Corporation.

22 Just to start with, DCSPC officially joins
23 DNREC's motion to dismiss DCBAC's appeal for the reasons
24 stated in DNREC's papers to the extent not previously

1 already done. I think I join Ms. Scott in her arguments
2 this morning. I do want to note that, in DCBAC's appeal,
3 the individual appellants are only referenced and
4 defined, there's no standing that's shown for each
5 individual appellant in that submission.

6 And so, you know, should the board be
7 inclined to move forward with the individual appellants,
8 we would respectfully request that each of them be
9 required to submit a declaration setting forth the basis
10 for their standing before having a hearing on the matter,
11 although we think that they have failed to establish the
12 standing in the appeal itself. That's all. Thank you.

13 MR. HOLDEN: Thank you, Mr. Burton.

14 The appellants?

15 MR. MALONEY: Chairman Holden, I'm sorry.
16 Kevin Maloney again.

17 I just want to ask DNREC if they are
18 planning to address the standing element of their motion
19 to dismiss today, or whether they feel that's premature
20 or what their plans are with respect to that or their
21 thoughts are with respect to that.

22 MS. SCOTT: Mr. Maloney, this is Devera
23 Scott.

24 DNREC does intend to raise standing as an

1 issue. This first motion was intended to clarify who the
2 parties are. We thought that, because we didn't even
3 have the email addresses of the individuals -- of most of
4 the individuals until recently, sort of sorting out who's
5 going to participate on their own behalf was the
6 threshold issue for us, and then we definitely will be
7 raising standing.

8 And as Mr. Burton indicated, you know, we
9 would be also requesting that the individuals provide
10 some sort of affidavit establishing why they have
11 standing to bring this appeal. For us, we're just trying
12 to find out sort of the playing field and who are the
13 parties and how we're going to communicate with each
14 other first.

15 MR. MALONEY: Understood. Thank you for
16 that clarification.

17 MR. HOLDEN: Is there a response from the
18 appellants?

19 MR. RICHARDSON: Yes. Yes. So a couple
20 of things: We -- and this is me specifically, Jeffrey
21 Richardson speaking now, and the other individuals will
22 speak as individuals and as members of an organization,
23 which is our right to participate in a democracy with
24 other entities and as community citizens to work together

1 towards community goals so we're going to exercise our
2 citizenship right in a democracy to speak with, work
3 with, and coordinate with each other, and to represent
4 those interests that are shared by communities.

5 Now, whether that meets the definition of
6 "organization," we are an organization and also
7 individuals. But for the issue of standing, there was
8 never an intent to address this and represent ourselves
9 as attorneys, which we are not, I am not. That was never
10 the case. And so we will deal with this as a community
11 group, as individuals as well.

12 So the standing issue, I think, is to a
13 great extent -- I don't want to say superfluous --
14 miniscule and easy to take off the table through that as
15 we will speak as individuals and also exert our right to
16 work in a coordinated fashion.

17 We also want to speak to the issue of
18 having to get an attorney. The fact that we were pressed
19 to get an attorney puts an inordinate amount of pressure
20 on community organizations. It's unfair. We asked for
21 just an opportunity to speak with DNREC, again,
22 exercising our basic democratic rights. DNREC says that
23 it encourages people to speak and to participate and
24 abide to all guidelines with the State for public

1 participation, and we simply exercise that right.

2 Now, when we did that, asking for a
3 meeting, then, essentially, things became legal
4 immediately. So this is significantly off-putting and
5 intimidating, and, also, it puts a burden on community
6 groups to have to get an attorney, maybe to spend
7 money -- is something that should not happen.

8 And so, for the issue of standing,
9 certainly, we're citizens. We are members of the state
10 of Delaware, residents. So we're going to speak as
11 individuals, but we'll also exercise our right to
12 coordinate with each other. We are not lawyers, or that
13 has never been stated so that's easy to take off the
14 table. So I think the standing is going to be based
15 essentially on those elements, and that's an easy answer,
16 and we can move forward. But we still exercise our right
17 to coordinate and work with each other.

18 And we also absolutely just do not agree
19 with the fact that community organization -- as for any
20 other organizations -- have to get attorneys in order to
21 speak with the State. We would prefer -- and we have,
22 from the very beginning, asked to speak with individuals
23 so we can address very important community issues
24 speaking with DNREC. Again, DNREC states that it is

1 concerned with community participation, that it wants to
2 reach out to the community. This discourages that.

3 I mean, there's even been language that
4 has been disparaging, I mean, calling us a "supposed"
5 organization. Why would that -- something like that come
6 from a state organization speaking to community
7 residents? Our goal was simply to engage residents to
8 make sure people know what's happening. Our goal was to
9 hopefully achieve a collaborative effort with the State
10 of Delaware around this very important project because of
11 the other issue involved, health and environmental issues
12 that are very significant, and to engage in a
13 collaborative effort. That was our goal.

14 So here we are, engaged in a legal
15 dynamic, which, again, is not really fair to community
16 residents. We should not be forced to get attorneys. So
17 that's it essentially.

18 I can get on to some other -- more
19 particulars here, but we also, as you stated in 5.7 of
20 the regulations, individuals can represent themselves
21 either with or without an attorney. We will represent
22 ourselves. We also do challenge the idea that we have to
23 get an attorney. We think that that should not happen
24 for any other group and/or individuals in the state of

1 Delaware when they have basic presence of the state that
2 they live in, that they have to get attorneys to address
3 basic issues related to their community, safety, and
4 environmental health. So that's the initial response to
5 that.

6 So the standing issue is, to a great
7 extent, moot based upon that. And if that is the basis
8 for a decision to move forward, then it seems like we can
9 move forward.

10 MR. HAHN: Yeah. This is Simeon. This is
11 Simeon Hahn, and I would like to -- I would like to just
12 make a quick statement regarding my individual standing
13 as well. I'm a resident of North Wilmington off of
14 Edgemoor Road, Morris Road, very close to the port
15 expansion area.

16 I have direct standing issues associated
17 with this project we could talk about, but as part of
18 what Jeff said, I joined the Delaware Community Benefits
19 Agreement Coalition about a year ago, and we have had
20 regular meetings with other members of the public
21 discussing this project. We've tried, as Jeffrey
22 indicated, to get a public meeting so we could discuss
23 some of these more. This is a little uncomfortable for
24 me, and kind of a legal hearing type of way of

1 communicating, but, you know, we provided verbal
2 comments. We were allowed two minutes apiece.

3 Three members of the organization provided
4 written comments. There was no response. This might be
5 more detail for the future, but, you know, we feel like
6 what was presented to the public to comment on was
7 incomplete. We worked together on the appeal. We worked
8 together in preparing for this hearing. And, you know,
9 as Jeffrey said, we're individuals as part of a group
10 that are all individually impacted and are working
11 collaboratively in this process. Thank you.

12 MS. CHEESEMAN: I belong to the Edgemoor
13 Gardens Neighborhood, which is directly --

14 MR. HOLDEN: I'm sorry. Could you give us
15 your name?

16 MS. CHEESEMAN: -- impacted by this port.

17 MR. HOLDEN: Could you give us your name,
18 please.

19 MS. CHEESEMAN: And I have been working
20 with the coalition for approximately three years, but I'm
21 still an individual, and I still have concerns for my
22 neighborhood.

23 MR. HOLDEN: Would you give us your name,
24 please.

1 DR. NYAHUMA: Good morning. My name is
2 Dr. Mujahid Nyahuma. I've been a long-term associate
3 with the residents here in Delaware. I'm really
4 concerned about the fact that this is supposed to be a
5 democratic state, the first state of the country, or
6 signing of the Constitution, and here we are trying to
7 exercise our democratic rights in terms of participation
8 in a public discussion about issues that impact the
9 environment of all Delawareans. So I'm here to support
10 Delaware Community Benefits Agreement, been a member from
11 the beginning, and would like to make sure that our
12 voices are heard. Thank you.

13 THE COURT REPORTER: Can I just clarify
14 that was Ms. Cheeseman speaking between Simeon and the
15 doctor.

16 MR. HAHN: Correct.

17 THE COURT REPORTER: Thank you.

18 MR. HOLDEN: Thank you. All right.

19 Any other comments from the appellants?

20 Any questions from the board right now?

21 Ms. Scott, a question for you: Is it
22 DNREC's stance on the issue of legal representation that
23 the appellants that are with us today, that DNREC
24 supports their consideration in moving this appeal

1 forward, but they can't represent others or represent the
2 organization?

3 MS. SCOTT: That's correct. We do not
4 object to the individuals representing themselves.

5 MR. HOLDEN: All right.

6 Mr. Richardson, did you have a comment
7 there?

8 MR. RICHARDSON: I heard that. So the
9 thing I think we have to deal with is while we are not
10 going to be dealing -- we're still going to work and
11 coordinate with each other, and I guess this is a legal
12 definition of organization, official organization. I
13 don't know how you define "organization." Does that mean
14 two or three people coming together to work together?
15 Does that mean a registered -- specifically registered
16 organization?

17 The issue that I think we're trying to
18 deal with is right here, this issue of person. And the
19 statute itself, it includes individual groups or
20 individual corporations, all kinds of things -- the
21 definition of a person. So -- and, again, the testimony
22 is very, very important, and we're looking at the issue
23 of individuals, groups of individuals, corporations of
24 all kinds, that's the definition of a person. So for a

1 person, it seems not to necessarily debate this issue,
2 but it seems like an organization could be a person as
3 well.

4 And so we're going to be moving forward as
5 individuals speaking, but just looking at some of the
6 information that was used in previous hearings, the
7 definition of a person would not necessarily exclude it.
8 I'm just making that as a point of information for the
9 record. But we're going to speak as individuals who are
10 going to be continuing to work in a coordinated fashion,
11 one, because we don't want our rights to work with
12 other -- this is very fundamental to America going back
13 to de Tocqueville as the statements about America. That
14 was something that faced everyone in the society --

15 THE COURT REPORTER: Going back to what?
16 I'm sorry. Going back to what?

17 MR. RICHARDSON: De Tocqueville, Alexis de
18 Tocqueville, who visited America and was taken by the
19 industry and the coordinating efforts of the Americans.
20 This is, like, many, many years ago in the early part of
21 the country.

22 But the greater point is that this
23 definition of a person in statutes includes individuals,
24 groups of individuals, corporations, all kinds of things.

1 So we're going to continue to exercise our right to
2 coordinate and work with each other.

3 And, again, we absolutely are against the
4 need to have an attorney just because we are an
5 organization. So what does this mean for all community
6 organizations in the state of Delaware? That they have
7 to get an attorney to be able to speak to the State.
8 That's a tremendous and unfair burden to put on
9 organizations and communities so that's something that
10 we, again, just don't agree with, and we want to make
11 that clear for the record.

12 And we're going to speak and continue to
13 coordinate as individuals, working, as Ms. Cheeseman
14 said, to address issues and concerns for our community.
15 That is our right.

16 MR. HAHN: Yeah. This is Simeon. So I
17 had a question too. If we were individuals, and we
18 wanted to work together as a group of individuals, would
19 that require an attorney? Because that would really put
20 individuals at a significant advantage [sic] in being
21 able to appeal and then not be able to work together
22 without hiring an attorney. So if a corporation has to
23 be represented by an attorney, we, as a group of
24 individuals, does that standard still apply? And if I

1 was a specific individual, I understand I would not have
2 to hire an attorney.

3 MR. HOLDEN: Mr. Maloney, are you --

4 MR. HAHN: That would be my right.

5 MR. HOLDEN: Mr. Maloney, are you raising
6 your hand?

7 MR. MALONEY: No. I'm just, A, thinking,
8 but, B, you know, I'm not sure it's the appropriate role
9 for anyone to be answering legal questions from one of
10 the appellants or potential appellants.

11 MR. HOLDEN: I understand.

12 Mr. Horsey, do you have a question?

13 MR. HORSEY: Yeah. I've got one question.
14 Maybe this is either to Mr. Maloney or Ms. Scott or to
15 one of the appellants. The definition of standing, does
16 anybody mind quoting that? I mean, because it appears
17 like the only thing they're saying is because we live
18 there and -- because we live in Delaware and because
19 we're in group -- we're in a group, a civic organization,
20 we've got standing. Is that the legal definition of
21 standing in the state of Delaware, please?

22 MS. SCOTT: This is Devera Scott, and I
23 will pull up the statute, but I think we're talking about
24 two different things, really.

1 Standing is your ability to bring an
2 appeal to a board such as this, where the issue that we
3 raised is the unauthorized practice of law. So we're
4 not -- at this juncture, we think that discussing
5 standing is really premature, but I will give you the
6 citation from -- it says "Any person" -- this is -- I'm
7 sorry. I'm citing from Title VII, Section 6008A, Appeals
8 to the Board. "Any person whose interest is
9 substantially affected by any action of the secretary may
10 appeal to the Environmental Appeals Board within 20 days
11 after receipt of the secretary's decision or publication
12 of the decision." That's the statutory standard for
13 bringing an appeal to the board.

14 But our motion is really focused on the
15 unauthorized practice of law, and really trying to get
16 some clarity into the process and to who we should be
17 talking to.

18 So, of course, as I've said, the
19 organization cannot, as it -- in its name cannot be
20 represented by these individuals, and these individuals
21 must participate before the board, speak to the board,
22 participate in this process on their own behalf. What
23 they do, you know, behind the scenes to talk to each
24 other and collaborate that way, we are not trying to

1 interfere with those efforts. We're just talking about
2 the participation, the official participation, speaking
3 to the board, communicating with the board, arguing and
4 presenting legal arguments and briefs and hearings such
5 as this before the board, that those individuals must
6 represent themselves.

7 MR. HORSEY: Thank you, Ms. Scott.

8 MR. TWEEDIE: Jameson Tweedie. I
9 apologize for adding in. I also represent DNREC. I just
10 wanted to chime in in response to your question.
11 Paragraphs 12 and 13 of our motion touch directly on the
12 question you asked, Board Member Horsey, and speak to the
13 need for specific factual allegations, not just general
14 assertions of harm to the state or its environment.

15 MR. MALONEY: This is Mr. Maloney in
16 response to Mr. Horsey's question, and in addition to
17 Ms. Scott's representations, there's a -- as I think most
18 of you have some experience with this board, and as you
19 probably know, there is a significant body of case law
20 which discusses the specifics and the details of the
21 standing requirement.

22 But what I want to make sure I understand
23 is that none of the parties expect today for the standing
24 issues to be resolved. The issue today, as I understand

1 it now, as it's been narrowed down to this question of
2 unauthorized practice of law. So if that's not correct,
3 I would suggest that this is the time to speak up and set
4 me straight, if you will.

5 MR. BURTON: Mr. Maloney, this is William
6 Burton from Barnes & Thornburg. As I think I said
7 earlier, I think standing was raised in the motion to
8 dismiss because the individual appellants did not plead
9 facts sufficient to show that they had standing to bring
10 the appeal without being represented by this coalition.
11 But to the extent the board is going to be inclined to
12 allow them to move forward as individual appellants, we
13 think that a submission should be made showing that they
14 do have individual standing to bring appeals so that, at
15 the hearing, we can further evaluate that issue. Thank
16 you.

17 MR. MALONEY: Understood. Thank you.

18 MR. HOLDEN: So, Ms. Scott, am I
19 summarizing right that it's DNREC's position that you're
20 asking the board to dismiss the organization and to
21 confirm that the individual appellants can only represent
22 themselves?

23 MS. SCOTT: That's correct. As far as
24 standing, we're not waiving that argument. At this

1 juncture, however, having the clarity of who the
2 participants are, I think as I said, is a threshold
3 issue, and then we do intend to raise standing with the
4 individuals. They still have that obligation to show
5 that they're substantially affected by the decision of
6 the secretary.

7 But if we are successful in this motion,
8 then at least we'll know who the players are, how we're
9 going to communicate with each other so that if we file a
10 subsequent motion to dismiss on standing, then the
11 individuals can respond directly, and we think that would
12 be the appropriate process, and in fairness, to give
13 those individuals the opportunity to submit their own
14 documentation supporting why they have standing in this
15 matter.

16 MR. MULROONEY: I have a question for
17 Ms. Scott. So is it DNREC's contention that the Delaware
18 Community Benefits Agreement Coalition cannot be a party
19 to this appeal if they don't have legal representation?

20 MS. SCOTT: That's correct.

21 MR. MULROONEY: Okay.

22 MR. HOLDEN: So I have a question for the
23 parties, right, and a little bit of discussion because I
24 think that the language is important, right? You know,

1 there was some discussion over the public comment period
2 and the interaction and the desire to talk to DNREC as
3 they permit or consider a permit application, right?
4 And, today, this isn't the body that addresses those
5 items or those issues.

6 You know, today, I hear DNREC saying that,
7 you know, as has just been discussed, that you can
8 represent yourselves as a -- in a legal proceeding, which
9 is what we are in today. And I think that the board
10 works hard to provide that opportunity to persons, to
11 individuals, to corporations, to organizations, but we
12 also try to be very mindful to do that in compliance with
13 the law.

14 Do the appellants have direct argument or
15 discussion around your belief that you can represent
16 someone or an organization or someone else in a legal
17 proceeding?

18 MR. RICHARDSON: We're going to be
19 representing ourselves as citizens working together and
20 coordinating together. That's certainly our right.
21 We're not, and never have we stated, that we are legal --
22 or that we are lawyers that are providing legal
23 representation for Delaware Community Benefits Agreement
24 Coalition. So that, I'll say, is a misinterpretation of

1 what we have been doing. We are not lawyers.

2 And so, again, if standing is based upon
3 that, we will represent ourselves as individuals
4 coordinating as community members, again, our right,
5 which has not been excluded from the statements that I've
6 heard.

7 Also, we remain open to the right to
8 engage, if we needed to, a legal representation because
9 that's just something that's been misstated over and over
10 again fully, and we have to get this or we can't even
11 participate so that's still something that we could do in
12 the future if we chose to do that. But for this
13 particular moment right now, April 12th, we're going to
14 be engaging as individuals. And so if standing is based
15 upon that, we can do that, and we will coordinate as is
16 our right to do.

17 And that has been stated, I think, by
18 Ms. Scott, I think, in reading the regulations that we're
19 able to do that so we will do that. What we do on our
20 own, as you've mentioned, is what we do. So we're here
21 as individuals, and we can, I think, get to a discussion
22 about standing because we think we have some salient
23 points that are relevant to the issue of standing, and we
24 think we meet those thresholds.

1 So, hopefully, that answers the question.
2 If not, I can do that again.

3 MR. HOLDEN: Thank you, Mr. Richardson.
4 Any other questions from the board?

5 MR. HAHN: This is Simeon. I'd like to
6 also enter -- at the issue of standing, we researched
7 Jeanette Swain, who's a member of the case with the
8 Coastal Zone Industrial Control Board, that precedent.
9 And, you know, it was stated there that that same process
10 is used for the Environmental Appeals Board, not strict
11 rules of presenting evidence.

12 But in terms of individual standing, all
13 of us are prepared to present information relative to our
14 individual standing and impacts, especially based on
15 Swain. We've all been recreationally impacted. We've
16 all experienced --

17 MR. HOLDEN: Mr. Hahn?

18 MR. HAHN: -- cumulative impacts.

19 MR. HOLDEN: Mr. Hahn, I appreciate the
20 comments. I would ask you to hold for a second.

21 MR. HAHN: Okay.

22 MR. HOLDEN: I believe DNREC is saying if
23 the individual appellants survive the motion to dismiss
24 and move forward, that standing will be the next item on

1 the table, right?

2 MR. HAHN: Okay.

3 MR. HOLDEN: And so I don't --

4 MR. HAHN: Well, yeah. Depending on the
5 ruling, that's what I was concerned -- because we would
6 like to get all of our evidence and positions on the
7 record.

8 MR. MALONEY: Mr. Hahn? Yeah. This is
9 Kevin Maloney, the attorney for the board. I think I'm
10 on solid ground saying you have no concerns about being
11 dismissed for lack of standing as a result of today's
12 proceeding. In other words, that's an issue that's going
13 to be addressed down the road just as Chairman Holden
14 just mentioned.

15 MR. HAHN: I understand that. Thank you.

16 MR. MALONEY: So you're going to have your
17 opportunity to present evidence that you believe supports
18 your-all's standing to --

19 MR. HAHN: I understand that. But it was
20 a specific motion -- discussion towards the DNREC motion,
21 which talked about the legal issue, then it also talked
22 about failure to provide standing based on other
23 criteria, so that was brought up. That's only reason I
24 brought it up as well. We do feel very confident that we

1 have individual standing.

2 MR. MALONEY: Okay. Thank you for your
3 comment.

4 MR. HOLDEN: Questions from the board for
5 any of the parties?

6 MS. RIDDLE: Yes. Can I ask a question?

7 MR. HOLDEN: Ms. Riddle?

8 MS. RIDDLE: Yeah. This is Frances
9 Riddle. Just a question of clarification. I'm a little
10 confused. If the parties were to go forward, the
11 appellants as individuals, would they need to file a new
12 appeal, or will this appeal go forward? I'm not quite
13 sure how if they're individuals on appeal. Or would it
14 have to be turned into five -- potentially five appeals?

15 MR. MALONEY: This is Kevin Maloney. I'd
16 be interested in hearing DNREC's response to that
17 question.

18 MS. SCOTT: That's a very good question.
19 So in this case, they have filed this notice of appeal.
20 I do think it would be appropriate for the individuals to
21 have an opportunity to file their own notices of appeal
22 and perhaps to sort of streamline -- you know, streamline
23 the process if they could be required as part of that
24 additional submission to include those affidavits that

1 Mr. Burton mentioned that sort of would clearly outline
2 their standing to bring this appeal, and not just, you
3 know, sort of these general assertions about harm, but
4 their specific -- the specific harm to themselves. So I
5 hope that answered the question.

6 MR. HOLDEN: Thank you, Ms. Scott.

7 Ms. Riddle, did that satisfy your
8 question?

9 MS. RIDDLE: Yes. I guess my only other
10 concern would be are there issues of timeliness and would
11 they be waived given that we had to go through this step
12 in the process, hypothetically?

13 MR. HOLDEN: Ms. Scott, I wonder if we get
14 to the point of the appellants submitting affidavits and
15 clarifying their own issues around the appeal, would
16 those be filed as kind of addendums? And I don't know
17 that my terms are right, right? But addendums to the
18 initial appeal that preserves this process forward,
19 right, which is also leading us to a consolidated appeal
20 for the other appeals dealing with the secretary's order.

21 Is DNREC comfortable in that fashion? To
22 me, a new appeal is regulatorily complicated and starts,
23 you know -- starts a clock over, which I don't think
24 benefits anybody in this situation.

1 MS. SCOTT: Well, I think, Chair Holden,
2 similar to how a motion to dismiss would be addressed in
3 a trial court situation, if a party moved to dismiss, the
4 court could require the party to file an amended
5 document. In court, it would be an amended complaint,
6 but here, it could be an amended statement of appeal.
7 Again, that would include their specific standing so that
8 we could then move to the next step, which would really
9 be challenging their standing if we think that that is
10 something that is appropriate for us as a next procedural
11 step.

12 So I'm not looking to start -- I'm not
13 concerned so much with the timeliness of the appeal. I
14 think you could treat it as an amended notice of appeal,
15 and we are working on a scheduling order with the other
16 parties, which is another reason why we need to know who
17 on -- of these individuals participating so we can
18 include them in these discussions.

19 I think, right now, we are looking far
20 enough out for the hearing on the merits that, you know,
21 having the parties here submit an amended notice of
22 appeal with their standing -- specific standing
23 statements shouldn't delay the process.

24 MR. MALONEY: Ms. Scott, Kevin Maloney

1 again. I think what Chairman Holden might have been
2 asking, but what I definitely want to ask is, just
3 point-blank, will DNREC make a commitment to not
4 challenge the appellants' timeliness of filing the appeal
5 if they file some type of declaration or amended notice,
6 amended statement of appeal?

7 MS. SCOTT: I will state that DNREC will
8 not challenge based on timeliness, but we are not waiving
9 our ability to challenge their standing.

10 MR. MALONEY: No. Absolutely understood.
11 Okay. Thank you for that clarification.

12 MR. HOLDEN: All right. Thank you both.
13 For the board, any other questions?

14 Kevin, do we have a need for any other
15 opposing or other from the parties, or are we in a
16 position where the board may consider some deliberation?

17 MR. MALONEY: I think that we're ready to
18 go unless the parties feel strongly that they have
19 additional information to submit.

20 MR. RICHARDSON: Yeah. Basically that --
21 so I've heard the word "amended" being used. I've heard
22 the word "timeliness" being used so -- yeah. You know,
23 we did spend a lot of time invested already. We can talk
24 about that later.

1 But I think for right now, the parties
2 agree, and we agree with the information that has been
3 submitted as individuals so that information still
4 stands. So we can go around the room right now and save
5 some time. Everybody's going to say, We agree with what
6 was submitted as individuals and that -- maybe that will
7 take care of that, and that addresses the issue of us
8 agreeing with the current statement, and then we can
9 begin to move on as individuals. And maybe we don't have
10 to submit anything again, but this information we all
11 agree with, which we did, and we accept that. We make a
12 statement today, we go around to each individual saying
13 that we agree with the information that's been submitted,
14 and then we move forward.

15 MR. HOLDEN: Mr. Richardson, I think, and
16 I'm going to speak for myself, but I'm going to ask
17 anyone on the board that disagrees, I don't know that
18 that benefits our ability to address what -- the question
19 in front of us today, which is the motion to dismiss the
20 organization or address anyone trying to practice law on
21 the behalf of another, right?

22 And so I think what has been talked about
23 and a potential narrative moving forward to address
24 that -- you know, affidavits that address standing, which

1 is a very common practice, providing all the parties time
2 then to review those and make a consideration for their
3 determination of standing, right? So we have some
4 contemplation time that's also going to be needed.

5 But I ask the board, any of the board
6 members interested in said narrative now?

7 Mr. Horsey? I can't hear you.

8 MR. HORSEY: I think what you're asking,
9 and I don't disagree, is that I would like to make a
10 motion we go into executive session to discuss this and
11 deliberate. Is that not the time now?

12 MR. HOLDEN: All right. We have a motion.
13 Is there a second?

14 MR. MULROONEY: Second.

15 MR. RICHARDSON: I also -- I'm thinking
16 about it. Can you let us know, either when you come back
17 or something, who-all is -- who is here from the board?
18 We know who we are, but -- because it's hard sometimes
19 for us to see maybe everybody, but to know who --

20 MR. HOLDEN: I understand.

21 MR. RICHARDSON: -- I'm talking to.

22 MR. HOLDEN: I understand, Mr. Richardson,
23 and I called them out by name, but that doesn't
24 necessarily tie a name to the face. And so my name is

1 Dean Holden.

2 MR. RICHARDSON: Okay.

3 MR. HOLDEN: Ms. Riddle is with us. She's
4 got her hand up. Thank you.

5 MR. RICHARDSON: Okay. Yes.

6 MR. HOLDEN: Mr. Mulrooney. Thank you,
7 sir. And Mr. Horsey.

8 MR. RICHARDSON: Okay. Great. Sorry.
9 All right.

10 MR. HOLDEN: That's okay. Any discussion
11 from the board on the motion?

12 Mr. Burton?

13 MR. BURTON: Thank you, Mr. Holden. I
14 just wanted to quickly address -- I think Ms. Riddle
15 raised an important issue here in that the base of the
16 Delaware Community Benefits Coalition's appeal is on
17 behalf of that coalition, and not really on these
18 individual appellants. They're only referenced as a
19 list. They're not referenced anywhere else in the
20 appeal. This appeal seems to be entirely on behalf of
21 the coalition so I think that if the board finds that the
22 coalition is required to have counsel as an organization
23 under Delaware law, that they should dismiss this appeal
24 in its entirety.

1 I don't think that there's enough in this
2 appeal that says that it was filed on behalf of these
3 individuals. And I think Ms. Riddle's questions go
4 directly to that point and to that issue. Thank you.

5 MR. RICHARDSON: Who was speaking? Who
6 was that that just spoke? Again, just want to...

7 MR. BURTON: William Burton from Barnes &
8 Thornburg.

9 MR. RICHARDSON: And you're representing?

10 MR. BURTON: Diamond State Port
11 Corporation.

12 MR. RICHARDSON: Okay. So Diamond State
13 Port Corporation, okay. Great. Thank you so much.

14 MR. HOLDEN: So we have a motion and a
15 second. I'll ask for raised hands for in favor of the
16 motion.

17 (All board members raise hands.)

18 MR. HOLDEN: And any raised hands in
19 opposition of the motion?

20 (No board members raise hands.)

21 MR. HOLDEN: All right. So for the
22 parties, the board is going to transfer to a different
23 video conference Webex link for an executive session.

24 For the board members, Mr. Skadsberg sent

1 an updated link out just as the hearing started so look
2 for that recent email, and you can use that to get in.
3 We'll take a little bit of time.

4 For the parties, I provided, and I'll tell
5 you the cell phone number again that you can send in
6 contact information, whether it's an email or a phone
7 number, we will notify you about five minutes before
8 we're coming out of executive session. I suspect this is
9 going to be maybe 20 or 30 minutes, would be my guess,
10 but I don't control that. But we will notify you either
11 via email or text message, right? Mr. Skadsberg will
12 send an email to all the parties. But if you've got
13 another notification method, please get that information
14 to him. And with that, we're going to depart for
15 executive session.

16 Mr. Horsey?

17 MR. HORSEY: Hey, Dean, as much trouble as
18 everybody had getting in -- this is a question for DNREC.
19 Does it hurt for them to just stay logged in and we jump
20 out?

21 MR. HOLDEN: That's a great idea. They
22 can stay right here. They can keep the connection open.
23 There's no need to close it. That works just fine.

24 MR. RICHARDSON: Thank you very much. We

1 appreciate that.

2 MR. HOLDEN: Thank you, Mike.

3 MR. HORSEY: Thank you. Board members,
4 I'll see you momentarily.

5 (Brief recess.)

6 MR. HOLDEN: Is there a motion from the
7 board? Mr. Horsey?

8 MR. HORSEY: I move, number one, to grant
9 DNREC's motion to dismiss, in part, dismissing the
10 Delaware Community Benefits Agreement Coalition for lack
11 of counsel. And, number two, to allow -- individual
12 appellants may proceed contingent upon presenting
13 individual affidavits or declarations aimed at
14 establishing standing and individual amended statements
15 of appeal within 30 days.

16 MR. HOLDEN: Thank you, Mr. Horsey.

17 Is there a second?

18 MR. MULROONEY: Second.

19 MR. HOLDEN: From the board, is there any
20 discussion on the motion?

21 Okay. Ms. Riddle, do you vote in favor or
22 opposed?

23 MS. RIDDLE: In favor.

24 MR. HOLDEN: Mr. Horsey, your motion, in

1 favor?

2 MR. HORSEY: In favor, yes.

3 MR. HOLDEN: Mr. Mulrooney?

4 MR. MULROONEY: In favor.

5 MR. HOLDEN: And I vote in favor so that's
6 a unanimous motion. The board will issue an order on
7 this individual hearing.

8 I thank you all for the time. I'm sorry
9 about the IT challenges we had this morning. Thank you
10 for staying with us, and I hope you have a great
11 afternoon.

12 MR. RICHARDSON: Hello?

13 MS. SCOTT: Thank you.

14 MR. RICHARDSON: Hello? Before you -- are
15 you -- is that -- I'm not understanding. Are you saying
16 that you're going to end the meeting right now? Is that
17 what you're -- and then based upon that --

18 MR. HOLDEN: Yeah. Mr. Richardson, so
19 that's effectively the end of today's meeting, right?
20 And so the motion offers some direction; the order will
21 offer some direction, as the discussion around this
22 overall hearing has also offered some direction for you
23 moving forward.

24 MR. RICHARDSON: Do we get to respond to

1 that in any way, shape, or form? Or is that, like --
2 because we'd like to make a statement, you know. So we
3 got that. We'll have to respond to that, giving
4 something --

5 MR. HOLDEN: You can provide a written
6 statement. This forum is -- this meeting here is
7 concluded, and so Mr. Skadsberg at DNREC will be your
8 contact as well as the rest of the parties.

9 MR. RICHARDSON: So are you saying that
10 you met -- so you put us on pause -- I just want to
11 understand here. You put us on pause; you made a
12 decision. We don't get to comment or even ask questions
13 on the decision. That's the decision, and you're going
14 to send it to us, and that's the end of the meeting, and
15 that's how this works? Is that what you're suggesting?
16 Or, I'm just trying to understand.

17 MR. HOLDEN: Mr. Richardson, the board
18 hearing is over. The motion that was made will be
19 followed up with an order. There's not another
20 opportunity for discussion in this. We're going to close
21 the meeting out. You can continue to correspond with the
22 admin and the parties on this matter, and you most
23 certainly are welcome to make a statement in any way you
24 wish but this --

1 MR. RICHARDSON: Okay. Good.

2 MR. HOLDEN: -- hearing is not the place
3 to do that.

4 MR. RICHARDSON: We appreciate the
5 clarity. We'll do that.

6 THE COURT REPORTER: Are we off the
7 record?

8 MR. HOLDEN: Yeah. Yeah. The hearing
9 here is finished out.

10 (The hearing concluded at 11:18 a.m.)

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I do hereby certify that the foregoing hearing was taken before me, pursuant to notice, at the time and place indicated; that the statements of participants were correctly recorded in machine shorthand by me and thereafter transcribed under my supervision with computer-aided transcription; that the transcript is a true record of the statements made by the participants; and that I am neither of counsel nor kin to any party in said action, nor interested in the outcome thereof.

WITNESS my hand and official seal this 18th day of April A.D. 2022.



Notary Public

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