

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

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EDWARD BINTZ,	:	
	:	
<i>Appellant,</i>	:	
	:	Appeal No. 2024-04
v.	:	
	:	
DEPARTMENT OF NATURAL RESOURCES	:	
AND ENVIRONMENTAL CONTROL,	:	
	:	
<i>Appellee.</i>	:	
	:	

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**ORDER DENYING APPELLEE’S MOTION TO DISMISS**

Pursuant to due and proper notice of the time and place of hearing served on all parties in interest, and to the public, the above-captioned Appeal came before the Environmental Appeals Board (the “Board”) on October 22, 2024. The hearing was convened at 89 King’s Highway, Dover, Delaware. A virtual attendance option was also provided.

Members of the Board present and constituting a quorum were: Dean Holden (Chairperson); Michael Horsey; Randall Horne; Robert Mulrooney, and Deborah Wicks. Deputy Attorney General A. Zachary Naylor represented the Board joined by the Board’s administrative liaison, Janella Sapp.

Appellee, Delaware Department of Natural Resources and Environmental Control (“DNREC”) was represented by Deputy Attorney General Sawyer Traver (argued).

Appellant Bintz appeared *pro se*.

The Appeal challenges 2 conditional concurrence letters issued by the Secretary of DNREC (the “Letters”) in connection with the development of an offshore wind farm for electricity generation.

The Board received the Appeal on August 10, 2024. Appellee moved to dismiss the Appeal (the “MTD”) on the ground that the Appeal challenged matters that are not subject to the jurisdiction of the Board.

Prior to the October 22, 2024 hearing and in accordance with the Board’s Regulations, DNREC provided the Board with the chronology (7 *Del. Admin. Code* §105-4.0) consisting of the record before the Secretary with respect to the Letters. In deciding this MTD, in addition to considering the chronology, the Board considered the written submissions of the parties, and the oral arguments presented by DNREC and Appellant Bintz.

## **DISCUSSION**

### **Statute and Regulation**

The Board exists as “a quasi-judicial review board which is constituted in order to hear appeals of the Secretary [of DNREC].” 7 *Del. C.* §6007(b).

Delaware Code provides that “[a]ny person whose interest is substantially affected by any action of the Secretary may appeal to the [Board] within 20 days after receipt of the Secretary’s decision or publication of the decision.” 7 *Del. C.* §6008(a).

Where federal permitting actions implicate the Federal Coastal Zone Management Act, 16 *U.S.C.* §1451, *et. seq.*, affected states are asked to provide statements of concurrence or opposition to the project. How the states generate such letters is subject to the law and regulation of the various states. The Letters relevant to this appeal were issued as required by 7 *Del. Admin. Code* §2201 pertaining to the Delaware Coastal Management Program Federal Consistency Policies and Procedures.

### **Prevailing Law and Authority**

The Board’s regulations contemplate preliminary motion practice. 7 *Del. Admin. Code* §105-3.1.4. Here the Board considered the MTD under the standard of Superior Court Rule 12(b)(1) which provides for dismissal if it appears from the record that the Board cannot exercise jurisdiction. *Airbase Carpet Mart, Inc. v. AYA Associates, Inc.*, 2015 WL 9302894, \*2 (Del. Super. Dec. 15, 2015).<sup>1</sup>

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<sup>1</sup> DNREC has not moved to dismiss on any other grounds other than lack of jurisdiction.

This appeal presents a question of first impression in Delaware: may the Board hear an appeal challenging letters issued by DNREC's Secretary under Delaware state regulation, but which pertain to a permitting action of the federal government?

Each party presented persuasive authority from other jurisdictions and sources in support of their respective position in briefs and at oral argument.

### **May the Board Exercise Jurisdiction Over the Appeal?**

Without Delaware authority to guide it, the Board has determined to deny the MTD and allow Appellant to present the merits of his appeal.

The appeal arises from an action by the Secretary of DNREC taken pursuant to regulation adopted under Delaware Code. As such, *7 Del. C. §6008(a)* provides for an appeal path, as specified by *7 Del. C. §6008(b)*.<sup>2</sup> If that Secretarial action is ultimately shown to be in violation of the requirements provided by state law and regulation, then it would also appear no other forum exists for a Delaware property owner, with unchallenged standing, to appeal the propriety of that Secretarial action. Based on the record before it, the Board cannot determine that such an appeal would be futile because of the over-arching federal permitting process involved.

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<sup>2</sup> The law specifically pertinent to an appeal of a "final decision of the Secretary concerning any case decision" is set forth in *7 Del. C. §6008(b)*. See also, *Booth v. Garvin*, 2019 WL 462486, \*3 (Del. Super. Feb. 6, 2019).

The Board's Order is without prejudice to DNREC renewing its motion to dismiss as a matter of law due to lack of jurisdiction at the time of the hearing on the merits.

### **CONCLUSION**

Following the arguments by each of DNREC and Appellant Bintz, the Board entered executive session as permitted by 7 Del. C. §6008(a) to deliberate and receive legal advice. Upon conclusion of executive session, Board member Horsey moved to deny the Motion to Dismiss. By a vote of 5 in favor, with 0 opposed, the Board determined to so act.

Upon consideration of Appellee's Motion to Dismiss, the Board concludes that the jurisdictional issue presented to the Board is one of first impression in the State of Delaware and before this Board. Without controlling authority requiring dismissal, the Board considers this challenge to the Secretary's actions properly before the Board. A letter scheduling a hearing on the merits will be issued shortly. This Order is without prejudice to DNREC to renew or restate its motion in connection with the hearing on the merits.

**IT IS SO ORDERED** this 9th day of December, 2024.

/s/ Dean Holden (e-signed pursuant to 6 Del. C. §12A-107)  
Dean Holden, Chairperson

The following 4 Board members concur in this Decision and Final Order:

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

\_\_\_\_\_  
Randall Horne, Board Member

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

\_\_\_\_\_  
Michael Horsey, Board Member

Date: December 3, 2024

/s/ Robert Mulrooney (e-signed pursuant to 6 Del. C. §12A-107)  
Robert Mulrooney, Board Member

Date: November 29, 2024

/s/ Deborah Wicks (e-signed pursuant to 6 Del. C. §12A-107)  
Deborah Wicks, Board Member

The following 4 Board members concur in this Decision and Final Order:

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

\_\_\_\_\_  
Randall Horne, Board Member

Date: 12/3/2024

  
\_\_\_\_\_  
Michael Horsey, Board Member

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

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

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

\_\_\_\_\_  
Deborah Wicks, Board Member

The following 4 Board members concur in this Decision and Final Order:

Date: 12/9/24

*Randall H. Horne*  
Randall Horne, Board Member

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

\_\_\_\_\_  
Michael Horsey, Board Member

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

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

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

\_\_\_\_\_  
Deborah Wicks, Board Member