

BEFORE THE ENVIRONMENTAL APPEALS BOARD
OF THE STATE OF DELAWARE

IN RE: THE APPEAL OF)
WILMINGTON STEVEDORES, INC.) Appeal Nos. 91-04, 91-05
and DELAWARE AUDUBON SOCIETY) November 1, 1991
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OPINION

This opinion addresses the motions of the Department of Natural Resources and Environmental Control, ("DNREC") and Oceanport Industries, Inc., ("Oceanport") to dismiss the appeals of Wilmington Stevedores, Inc. ("WSI") and the Delaware Audubon Society ("Audubon")(collectively referred to as "appellants"), now pending before the Environmental Appeals Board, ("Board").¹

The following Board members heard argument on the motions to dismiss: Thomas Kealy, Chairman, Joan Donoho, Richard C. Sames, and Clifton H. Hubbard, Jr. Ann Marie Johnson, Deputy Attorney General represented the Board. Judith N. Renzulli, Esquire and Richard A. Forsten, Esquire of Duane, Morris & Heckscher represented the permittee, Oceanport. Jeanne L. Langdon, Deputy Attorney General represented DNREC. June MacArtor, Esquire, local counsel, H. Montee Wynn, Jr., Esquire and Usher Winslett, Esquire of Thatcher, Proffitt & Wood, New

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A permit applicant is entitled to appear and "produce any competent evidence in his/her behalf" in an appeal before the Board. 7 Del. C. sec. 6006(3).

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York for appellant, Delaware Audubon Society. John J. Schreppler, III of Bayard, Handelman & Murdoch represented Wilmington Stevedores, Inc.

For the reasons stated below, the Board grants the motions to dismiss the appeal of WSI and denys the motions to dismiss the appeal of the Delaware Audubon Society.

Background

WSI and Audubon appeal DNREC's issuance of a subaqueous lands permit and lease, and NPSDES and air permits to Oceanport for the purposes of building a pier to conduct bulk transfer operations along the Delaware River in Claymont. Oceanport occupies the facility formerly owned by Texaco and known as the Paragon Oil Petroleum Tank Farm. It is located in an M-3 Zone, which allows heavy industrial use.

In June of 1987, Oceanport obtained a Coastal Zone Status Decision from DNREC, (under the authority of Secretary Wilson), which found that: the use of the site as a bulk transfer facility predated the Coastal Zone Act; the use as a bulk transfer facility had never terminated; and that the modifications proposed in the May 1987 application did not constitute a significant expansion extension of that use. As a result, the Secretary ruled that "the proposed project is not regulated by

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Mr. Wynn and Mr. Winslett were admitted to practice before the Board pro hac vice pursuant to Supreme Court Rule 71. Local Counsel is required to attend all Board proceedings unless excused for good cause by the Board. Supr. Ct. R. 71(c).

the Coastal Zone Act." Hearing Officer's Report, April 9, 1991, incorporated by the Secretary's July 12, 1991 Order, at 16, (hereinafter, "Report").

Subsequently, Oceanport started construction work on its pier. DNREC, believing that further permits were necessary before such work was authorized, issued a Cease and Desist Order. The parties entered into Consent Agreements on November 7, 1988 and December 13, 1990 which apparently authorized construction on the Pier and a subsequently built conveyor system. Report at 21.

Ultimately, Oceanport applied for a subaqueous lands permit, NPDES permit and an air permit. Report at 1. Public hearings were conducted over the ensuing months and were finally completed in November and December, 1990. Id. On July 12, 1991, the Secretary issued an Order granting Oceanport its requested permits.

Standing of Appellants.

Oceanport has moved to dismiss both appeals on the grounds that they have failed to establish that each appellant "has an interest which has been substantially affected by the Secretary's action", as required by 7 Del. C. sec. 6008(a). WSI asserts in its complaint that "[a]s a corporate citizen of Delaware,...[it] shares the public's interest in subaqueous lands...[and]...the public's interest in Air Resources and Water resources in this state." Complaint, p.2. It also states that it has "a particular interest in preserving the integrity

of the Coastal Zone Act..." Id. WSI concedes that it is a competitor of Oceanport, but argues in its brief that this fact is irrelevant to a determination of standing. Ans. Br. at 9. Finally, at oral argument, WSI asserted that it also has a maritime interest in preserving the navigability of the waterways.

Section 6008(a) does not specifically define what interests are intended, and there are no Delaware cases interpreting this language. Because the meaning of this language is reasonably susceptible to different interpretations, it is necessary to look at the statutory scheme as a whole to determine its intent. Coastal Barge v. Coastal Zone Industrial Control Board, Del. Super., 492 A.2d 1242, 1245 (1985). An examination of the statutory scheme regulating air, NPDES, and subaqueous lands permits indicates that the Secretary is not required to consider the impact of granting these permits upon other competitors, or the availability of services generally, as might be required in a certificate of use and necessity, for example. Rather, the guiding principals are the impact upon the environment of Oceanport's activity. See 7 Del. C. secs. 6001, 6003.

The Board finds that status as a citizen of the State of Delaware alone is insufficient to confer standing under the statute. At minimum, the standard requires that an appellant's interest should be distinguishable from those interests shared by the public in general. Moreover, WSI's interests as a

competitor and as a maritime user of the waterway are not interests which chapter 60 and 72 was designed to protect. WSI has not alleged any facts which identify how a failure to appropriately regulate these environmental issues will affect its commercial or other interests. At oral argument, WSI did state that it had a maritime interest in maintaining the navigability of the Delaware River in the event of a spill. The Board finds this interest more remote than that contemplated by the statute.

Finally, even absent these failings, the statement that "WSI seeks only to maintain a level playing field by ensuring that Oceanport complies with the Coastal Zone Act and the Status Decision" (Ans. Br. at 10), and the entire thrust of the WSI complaint clearly indicates that the complaint belongs before the Coastal Zone Industrial Control Board and not the Board.

In contrast, the Audubon Society has stated interests which are distinguishable from those of the general public. In its national charter, Audubon notes as one of its several purposes its intent to "promote the protection and preservation of natural resources, including the encouragement, establishment and maintenance of nature sanctuaries." Constitution of National Audubon Society, Inc., Art. II(1)(e), adopted by the Delaware Audubon Society Constitution, Art. II, sec. 1. Moreover, Audubon's statement regarding the impact upon the Delaware River, waterfowl and fish is sufficient to meet the

requirement of showing how it will be "substantially affected."³

- For the above reasons, the Board concludes that WSI does not have standing to appeal and that Audubon has adequately demonstrated standing to appeal.

Specificity of the Audubon Complaint

Oceanport also moves to dismiss the complaint against Audubon for lack of specificity. We find that the Audubon complaint is sufficient to state its basis of appeal.

Chapter 60 does not identify how specific a letter of appeal must be. In viewing the statutory scheme as a whole, however, it is clear that a minimal specificity requirement was contemplated. The overall mandate of the chapter is to ensure that the environmental interests of the public are protected. See 7 Del. C. sec. 6001; State v. Getty, Del Super., 305 A.2d 327 (1973). An underlying principal throughout the statute is that the public is entitled to, and has an interest in

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The letter of appeal states:
Audubon members and other citizens who use the Delaware River will be impacted by this project if polluted waste water is discharged into the river, or if waterfowl and fish are adversely impacted by harmful substances released into the environment (air, water, land) by this project. The citizens of Delaware want their coast lands and waters restored, kept vital and preserved. They cannot achieve this when the Secretary of DNREC errs in his decisions.

participating in the licensing process. Regulations are subject to public hearing, as are permit applications when an interested party submits a "meritorious request." 7 Del. C. secs. 6004, 6010. Finally, sec. 6020 requires that the chapter be liberally construed in order to "preserve the land, air and water resources of the State.

Similarly, pleadings must be liberally construed to entitle interested members of the public maximum access to Board appeal. Regulations of the Board 102(a) states that all appeals to the Board must be in writing and

shall set forth clearly and concisely the following: (1) the interest which has been substantially affected; (2) an allegation that the decision is improper; and (3) the reasons why the decision is improper. The request for appeal should be stated with sufficient specificity to notify the Board and the Department...of the reasons for the appeal.

These requirements are minimal, and are designed to be helpful to unrepresented appellants as well as a general criteria for pleading. The Audubon complaint states an interest, and recites at least three reasons for bringing the appeal. The regulations do not require any more detail than that, especially in light of the pre-hearing conference in which the parties must define issues, and identify the evidence which will come before the Board.

Jurisdiction-Public Subaqueous Lands

Both DNREC and Oceanport have additionally moved to dismiss the appeals on the basis of Worldwide Salvage v. Wilson, et. al., Del. Super., No. 84A-OC1, (1986). It is undisputed that the Board has no jurisdiction to hear appeals of a denial of a permit on state-owned subaqueous lands. 7 Del. C. sec. 7210, 6008(e).⁴ Oceanport and DNREC argue, however, that Worldwide also prohibits appeals from grants of permits⁵ involving state-owned subaqueous lands.

In Worldwide, a party sought to bring an appeal pursuant to 7 Del. C. sec. 6008(a) which states that: "Any person whose interest is substantially affected by any action of Secretary may appeal to the Environmental Appeals Board...". At the time the decision was made, subaqueous land permits were governed under chapter 61 of title 7. There was no specific right to an appeal under chapter 61. Thus, the appellant sought to obtain jurisdiction using the general appeal language in sec. 6008.

⁴ Section 6008(e), amended effective June 25, 1991, states that:

There shall be no appeal of a decision by the Secretary to deny a permit on any matter involving state-owned land including subaqueous lands, except an appeal shall lie on the sole ground that the decision was discriminatory in that the applicant, whose circumstances are like and similar to those of other applicants, was not afforded like and similar treatment.

⁵ Although Oceanport argued that Worldwide applies here, they have reasoned that the Board has other sufficient grounds to dismiss the appeals.

However, the Court ruled that Sec. 6008(e) did in fact deny appeals from a grant or a denial of a permit on state-owned land including subaqueous lands.

Subsequent to Worldwide, chapter 61 was repealed and chapter 72, governing subaqueous lands became effective on July 9, 1986. In chapter 72, the legislature created a specific right of appeal to the Environmental Appeals Board for all matters involving subaqueous lands except for denial of permits on state-owned lands. ⁶ In an amendment to chapter 60 passed June 20, 1991, the General Assembly enabled appeals taken from permit denials of State owned subaqueous land under section 6008(e) in those cases where "the sole ground that the decision was discriminatory in that the applicant, whose circumstances are like and similar to those of other applicants, was not afforded like and similar treatment."

However, both DNREC and Oceanport concede that only half of the subaqueous land in question is alleged to be owned by

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Section 7210 states that:

Any person whose interest is substantially effected by any action of the Secretary or of DNREC taken pursuant to this chapter, may appeal to the Environmental Appeals Board as established by section 6007 of this Title within twenty days of the announcement of the decision. Such appeal shall be governed by subsections 6008 and 6009 of this Title. There shall be no appeal of a decision by the Secretary or the Governor to deny a permit on any matter involving State owned subaqueous lands.

the State.⁷ Furthermore, DNREC admits that EAB review of the granting of the air and NPDES permit is proper. DNREC Op. Br. at 6. The Board is at a loss as to how to hear half of an appeal, and concludes that it would have to hear all of the evidence with regard to the permits for the privately owned portion of the pier. Because ruling on the applicability of Worldwide would not obviate the need for a hearing, the Board declines to rule on this question.

For the above stated reasons, the Board, by a vote of three to one, GRANTS the Motion to Dismiss the Appeal of WSI, (Hubbard dissenting) and DENIES the Motion to Dismiss the appeal of Audubon (Kealy dissenting).



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