

BEFORE THE ENVIRONMENTAL APPEALS BOARD
FOR THE STATE OF DELAWARE

FRIENDS OF HERRING CREEK, ET. AL.)	
Appellants,)	
v.)	Appeal No. 97-02
)	
SECRETARY OF DEPARTMENT OF)	
NATURAL RESOURCES & ENVIRONMENTAL)	
CONTROL, STATE OF DELAWARE,)	
Agency-below,)	
Appellee.)	
.....)	
)	
GEORGE H. HARRISON, JR.)	
Permittee-below,)	
Cross-Appellant,)	
v.)	
)	
SECRETARY OF DEPARTMENT OF)	
NATURAL RESOURCES & ENVIRONMENTAL)	
CONTROL, STATE OF DELAWARE,)	
Agency-below,)	
Appellee.)	

FINAL ORDER AND DECISION

Norman C. Barnett, Esq. of Schab & Barnett, P.A., 9 Chestnut Street, P.O. Box 190 Georgetown, Delaware 19947. Attorney for Friends of Herring Creek.

Jeanne L. Langdon, DAG of Department of Justice, State of Delaware, 89 Kings Highway, Dover, Delaware 19901. Attorney for the Secretary.

Jeremy W. Homer, Esq. of Parkowski, Noble & Guerke, P.A., 116 West Water Street, P.O. Box 598, Dover, Delaware 19903. Attorney for George H. Harrison, Jr.

Before Chairman Clifton H. Hubbard, Jr., Robert S. Erlich, Joan Donoho, and Ray K. Woodard, comprising a quorum of the Environmental Appeals Board. Joelle P. Hitch, Deputy Attorney General, Attorney for Environmental Appeals Board.

The Environmental Appeals Board (hereinafter the "Board") has scheduled a hearing on the above captioned appeals for March 24, 1998. The Secretary of the Department of Natural Resources (hereinafter "DNREC") has filed a Motion to Dismiss, which the Board heard through oral argument on February 24, 1998.

This appeal and cross-appeal involve the December 20, 1996, granting of a subaqueous lands permit by DNREC to George H. Harrison, Jr., for the construction of a 16-slip marina and boat ramp on the south side of Guinea Creek at "Creek's End" on Long Neck in Sussex county. DNREC has filed a Motion to Dismiss alleging three separate grounds for dismissal.

The first argument DNREC sets forth is that the Board lacks jurisdiction to hear these appeals under the Subaqueous Lands Act 7 *Del.C.* § 7210. The Subaqueous Lands Act, 7 *Del.C.* Chapter 72, provides at § 7210 that, "There shall be no appeal of a decision by the Secretary to deny a permit on any matter involving state-owned subaqueous lands." DNREC argues under this statute that there is also no right to appeal a decision of the Secretary in which a permit is granted on any matter involving state-owned subaqueous lands.

This issue was addressed in *Worldwide Salvage, Inc. v. Environmental Appeals Board*, Del. Super., C.A. No. 84A-OC1, J. Chandler (January 30, 1986). In *Worldwide*, the Court held that regarding "the Board's jurisdictional authority under 7 *Del.C.* § 6008, it is plain that the statute forecloses any right to appeal decisions denying permits involving subaqueous state lands". *Worldwide* at p. 7. The Court in *Worldwide* found that the Legislature had no intention of creating special appeal rights from decisions of the Secretary involving permits for subaqueous lands. The Court set out its rationale for this decision very clearly and it will not be reiterated here. *Worldwide* also states, "the Legislature did not intend to create, by negative implication, a right to appeal to the

Board from decisions to grant licenses or permits relating to subaqueous state lands." *Worldwide* at p. 12.

The Appellants argue *Worldwide* is factually distinguishable from the present case in that *Worldwide* did not deal with environmental protection. The Appellants assert the case was solely about economic rights of two competitors to obtain salvage rights. Appellants argue that the Court found no basis for administrative review because the third party had no stake in the outcome except for an economic impact. In addition, Appellants argue the third party in *Worldwide* did not participate in the application process thereby waiving their right to protest through the means provided them in § 6153 of the Act. In support of these arguments, Appellants cite the changes in the applicable statutes since the *Worldwide* decision. The Appellants further cite *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, Del. Supr. 636 A.2d 892 (1994).

Appellants' arguments are not persuasive. The *Oceanport* decision sets out the standard by which appeals may be brought before the Board. To have standing, the party bringing the appeal must be able to prove they would be "substantially affected by any action of the Secretary or the Department" under 7 Del.C. § 7210. Appellants' argument that this case deals with environmental impact as opposed to economic impact has some merit under the "substantially affected" test, however it does not impact on the right or lack thereof to appeal the granting or denial of a state-owned subaqueous land permit. No right exists under § 7210 therefore, the basis behind the appeal is irrelevant.

Appellants' argument regarding the change in the statute is also unpersuasive. The decision in *Worldwide* made the interpretation of the statute clear. In light of the holding in *Worldwide*, had the Legislature intended a different result than that decided in *Worldwide* it would have changed the

statute to specifically state such a right to appeal existed. The Legislature has made no such change. In fact, the Legislature enacted § 7210 with the same language as had been previously interpreted in *Worldwide*, that is, "there shall be no appeal of a decision by the Secretary to deny a permit on any matter involving state-owned subaqueous lands".

In addition to the jurisdictional argument, DNREC asserts Appellants do not meet the exception set out in 7 *Del.C.* §6008 (e). DNREC argues that the language in § 6008 (e) grants a narrow opportunity to appeal but only for the "applicant". DNREC did not provide the Board with any authority for this reading of the statute, and there is nothing in the statute or the regulations of the Board to support such a narrow reading of § 6008 (e). The Board therefore concludes that a party other than the applicant may assert the exception in § 6008 (e).

In order to successfully move forward pursuant to § 6008 (e), however, the Appellants must be able to show two things (1) that they were "substantially affected" under § 6008 (a) and (2) that there was discrimination in that the applicant was like and similar to other applicants yet was not afforded like and similar treatment as required by § 6008 (e).

The decision in *Oceanport* sets out the test for "substantially affected". The Appellants must first show "an injury in fact, which is the invasion of a legally protected interest within the zone of interest sought to be protected or regulated by the statute." The invasion as defined by *Oceanport* must be "1) concrete and particularized, and b) (sic) actual or imminent, not conjectural or hypothetical". *Oceanport* Del. Supr. 636 A.2d 892, 903 (1984) *citing* 112 S. Ct. at 2136.

The Appellants must also show an "actual connection between the injury and the conduct complained of -- the injury has to be 'fairly . . . trace [able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the

court." *Oceanport* at 903. The third part of the test requires that "it must be likely that the injury will be redressed by a favorable decision, rather than merely speculative". Id. at 903.

If the Appellants are successful in proving the "substantially affected" portion of the test, Appellants would then have to show discrimination in that the "applicant" was like and similar to other applicants yet not treated in a like and similar manner.

The Board has reviewed the submissions of the Appellants and taken into consideration the oral arguments. Although the Appellants assert in the "revised statement of appeal" that certain interests were "substantially affected", the Appellants failed to show a "concrete and particularized" invasion or that the invasion would be "actual or imminent, not 'conjectural' or 'hypothetical'" as required by *Oceanport*.

Assuming arguendo that Appellants were "substantially affected", there was no argument and little discussion in the submissions that there was discrimination in the treatment of the "applicant". The Appellants failed to show this applicant's "circumstances are like and similar to those of other applicants, [yet he] was not afforded like and similar treatment" in order to fall within the § 6008 (e) exception.

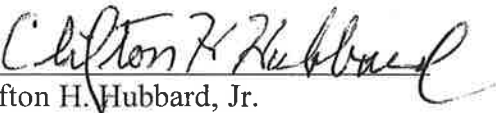
For the same reasons as stated above the Cross-Appellant's appeal is dismissed as there was no showing of discrimination against the applicant in the granting of the permit for 16 slips as opposed to 24. It is further the opinion of the Board that the conditions associated with the grant or denial of a permit are likewise not appealable under § 7210 and § 6008 (e) without a showing that the exception is met.

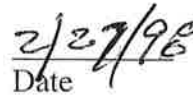
The Board will not address any remaining arguments by DNREC for dismissal as the Motion is granted based upon the lack of jurisdiction of the Board.

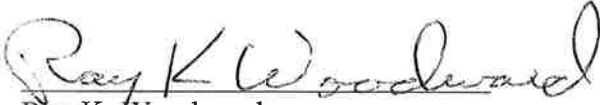
Accordingly, the Board grants DNREC's Motion to Dismiss and dismisses the appeal of the Friends of Herring Creek and the cross-appeal of George H. Harrison, Jr. The hearing scheduled for March 24, 1998, before the Board is canceled.


IT IS SO ORDERED.

The following Board members concur in this decision.


Clifton H. Hubbard, Jr.
Chairman


Date


Ray K. Woodward
Member


Date

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Joan Donoho

Joan Donoho
Member

3/3/98

Date

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Robert S. Ehrlich

Robert S. Ehrlich
Member

2/27/1998
Date

