

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

SURFRIDER FOUNDATION	)	
DELAWARE CHAPTER,	)	Appeal No. 2015-02
	)	
Appellant,	)	
	)	
v.	)	
	)	
DEPARTMENT OF NATURAL	)	
RESOURCES AND	)	
ENVIRONMENTAL CONTROL,	)	
	)	
Appellee	)	
	)	
AND	)	
	)	
CITY OF REHOBOTH BEACH,	)	
Intervenor-Appellee.	)	

**DECISION AND FINAL ORDER**

Following required public notice and in accordance with Subchapter III, Chapter 101 of the Delaware Code, a public hearing was conducted by the Environmental Appeals Board (“Board” or “EAB”) on June 23, 2015 in the Auditorium of the Richardson and Robbins Building, located at 89 Kings Highway, Dover, Kent County, Delaware concerning an appeal (“EAB Appeal“ or “Appeal”) filed by Surfrider Foundation, Delaware Chapter (“Surfrider”). The Appeal challenged the Record of Decision (“ROD”) issued by the Secretary of the Department of Natural Resources and Environmental Control (“DNREC”) on January 5, 2015. The ROD decided that Rehoboth Beach qualified to receive a loan to construct an ocean outfall for the disposal of treated wastewater under the Water Pollution Control Revolving Fund, under the guidance of the Environmental Protection Agency’s Clean Water State Revolving Fund.

Members of the Board present and constituting a quorum were Nancy J. Shevock (Chair), Sebastian LaRocca, Michael Horsey, Gordon Wood, Andrew Aerenon and Dean Holden. No Board members disqualified themselves or were otherwise disqualified. Deputy Attorney General Robert W. Willard represented the Board.

Surfrider was represented by Staley Prom, Esquire, a California-barred attorney who was admitted *pro hac vice* in accordance with Delaware Supreme Court Rule 72. Attorney Richard Emge also appeared for Surfrider. Deputy Attorneys General David Ormond and William Kassab appeared on behalf of DNREC and Glenn Mandalas appeared as counsel for the City of Rehoboth Beach (“City” or “Rehoboth Beach”).<sup>1</sup>

#### **BACKGROUND AND NATURE OF THE APPEAL**

DNREC Secretary David S. Small issued the ROD dated January 5, 2015. The ROD stated that it was prepared by DNREC for the Wastewater Disposal Options Including a Proposed Ocean Outfall for the City of Rehoboth Beach Wastewater Treatment Facility’s Final Environmental Impact Statement (“EIS”). The EIS was prepared by the City of Rehoboth Beach and its consultants and was accepted by DNREC.

The City of Rehoboth Beach Wastewater Treatment Plant (“RBWWTP”) currently receives wastewater from the City and surrounding areas of Henlopen Acres and Dewey Beach and discharges the treated effluent into the Lewes-Rehoboth Canal, which flows into Rehoboth Bay. The City now wishes to discharge the treated wastewater into the Atlantic Ocean.

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<sup>1</sup> Subsequent to the filing of the EAB Appeal, the City of Rehoboth Beach, as a party in interest who is directly affected by the Appeal, filed a motion to intervene in this matter. The motion was not opposed by Surfrider or by DNREC. Accordingly, the Chair entered an order on May 29, 2015 granting the City’s motion to join this matter as an Intervenor-Appellee.

As was explained in the ROD, DNREC has worked with the City over many years to limit or eliminate pollution. In 1993, DNREC issued a consent order to implement Biological Nutrient Removal at the RBWWTP. Other actions followed in subsequent years. Section 303 of the Federal Clean Water Act requires states to identify water bodies that do not meet water quality standards and to impose a Total Maximum Daily Load (TMDL). In 1996, Rehoboth Bay was listed as “water quality limited” by DNREC, which required the development of a TMDL. The TMDL was issued in 1998, requiring that “all point source discharges which are currently discharging into the Indian River, Indian River Bay and Rehoboth Bay and their tributaries shall be eliminated systematically.” In 2002, the consent order was finalized, which established a firm date of December 31, 2014 for the discharge to be eliminated and the new discharge method to be fully operational. Thereafter, additional agreements extended the timeline and the problem still remains today.

As noted in the ROD, in August, 2010 DNREC issued a Notice of Intent to prepare an EIS and conduct public scoping for the proposed ocean outfall project. Comments were accepted from agency reviewers and the public. A public scoping meeting was held on September 21, 2010 to independently evaluate the scope and contents of the EIS prior to its approval. A draft EIS was prepared by the City’s consultants and received by DNREC on December 15, 2011. After review by DNREC, the draft EIS was made available to reviewing agencies and the public on March 12, 2012. The period for public comment was 60 days, which is 15 days longer than the federal requirement.

A public hearing was held on April 10, 2012. This was the opportunity for all interested parties and the public to question or challenge the report. The hearing was conducted by an independent hearing officer hired by the city and approved by DNREC. Testimony was taken and comments were received until May 10, 2012.

A proposed final EIS was submitted to DNREC by the City in August, 2012. DNREC found certain issues were not adequately addressed and the City addressed those issues and submitted a revised final EIS in December, 2012.

The ROD explained that the EIS considered many alternatives for the disposal of treated wastewater, including among others taking no action, using a land application and an ocean outfall option. The Secretary noted in the ROD that DNREC's usual preferred alternative for disposal of treated wastewater is the land application. ( ROD at 16.) Under the land application alternative, treated effluent is pumped from RBWWTP to a spray irrigation facility to be land-applied. Five land application alternatives were considered. The City concluded that the land application alternative did not appear to be available. An extensive land search using a professional realtor over a period of several years was not successful in finding even a single landowner willing to sell their property to the city for the purpose of spraying treated effluent. At one point, the city tried to purchase a property that itself was too small to meet the needs of a spray irrigation facility, hoping to initiate a program of buying properties that other landowners would be willing to join, but the purchase offer was declined. (ROD at 16-17.)

Finally, the City decided that the best alternative financially and environmentally was the ocean outfall. (ROD at 18.). Under the ocean outfall alternative, treated effluent

is pumped from RBWWTP to an ocean outfall located more than one mile off the coast in the Atlantic Ocean.

In reviewing the EIS, the Secretary considered public comments and various potential impacts to the environment, including potential impacts on sea life.

Ultimately, the ROD noted that DNREC had recommended approval of the City's ocean outfall plan, and the ROD approved the ocean outfall plan for the requested loan.

However, the ROD stated that, as a condition, the City must conduct a storm water evaluation of its catchment areas and collection system that are associated with the existing five (5) outfalls which discharge directly to the Atlantic Ocean. The City will submit a planning level report to DNREC which identifies nonpoint sources of storm water effluent and options for controlling those sources in order to minimize potential impacts to swimmers, surfers and other water users within the near shore area. The report shall also include cost effective alternatives for improving storm water quality, reducing storm water volume within the collection system and an evaluation of disposal options, including possible reorientation, reconfiguration, extension or other upgrades to the outfalls. The storm water evaluation will include Engineers Estimates of Probable Construction Costs of the various approaches for improving storm water quality, reducing quantity and improving disposal methods. According to the ROD, the report shall be provided to DNREC by January 1, 2016.

The ROD concluded that all of the factors considered lead to the conclusion that the ocean outfall alternative satisfied the requirements for receiving the loan.

In its Appeal, Surfrider stated that it was founded in 1984 as a non-profit organization dedicated to the protection and enjoyment of the world's oceans and

beaches. The Delaware Chapter has a 17-year history of working for the conservation and responsible use of the State's coastline.

Surfrider said in its Appeal that it conducted a survey which showed a considerable amount of recreational activity in the area of the proposed ocean outfall pipe. Surfrider alleged that the outfall pipe would negatively impact the ocean environment, thereby disrupting the recreational activities of its members and the general public.

Surfrider alleged in its Appeal that the ROD was improper because it did not properly consider the law and does not adequately explain the rejection of the land application alternative. The Appeal also alleged that the outfall pipe could endanger sea animals, harm the coastal economy and damage recreational activities.

#### **MATTERS BEFORE THE BOARD**

Prior to the hearing, DNREC filed two motions to dismiss, in which Rehoboth Beach joined. One was a motion to dismiss for lack of subject matter jurisdiction, based on statutory authority as well as timeliness. The other motion to dismiss filed by DNREC (and joined by the City) sought dismissal for lack of standing. Also prior to the hearing, Surfrider submitted to the Board written responses to DNREC's motions.

Again, prior to the hearing, the Chair informed the parties that the June 23 hearing would be limited to these motions and the parties would be permitted to present argument at the hearing.

### Summary of DNREC's and the City's Position

Regarding the question of jurisdiction, DNREC<sup>2</sup> argues that the Appeal involved nothing more than an approval for the City to move forward and obtain a loan for its chosen method of complying with water pollution control laws. The loan is part of DNREC's administration of a state revolving loan program, the Delaware Water Pollution Control Revolving Fund, pursuant to *29 Del. C. § 8003(12)*. There is no language in that statute providing a right to appeal.

DNREC notes that the Appeal by Surfrider was filed pursuant to *7 Del. C. § 6008*, which provides 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...publication of the decision.” DNREC argues that appeals under § 6008 relate solely to appeals from actions taken under Chapter 60 and language in other statutes mirrors this quoted language. For example, § 6313, in Chapter 63 states that “Any person whose interest is substantially affected by any action of the Secretary may appeal to the Environmental Appeals Board in accordance with § 6008 of this title.” Similar or identical language is found in Title 7 at §§ 7412 and 7716. DNREC argues that this shows clearly that this language covers appeals of actions taken under Chapters 74 and 77. All of these statutes provide for an appeal to the EAB under § 6008. DNREC argues that there is no generalized authorization to appeal decisions of the Secretary. Rather, specific statutes grant a right of appeal and no such right is found in *29 Del. C. § 8003(12)*, noting that this section appears in a completely different title of the Delaware Code.

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<sup>2</sup> The City joined in DNREC's motion. Therefore, this opinion will simply use the term “DNREC” to denote their positions.

DNREC acknowledges that there are procedures issued by DNREC which appear in a document entitled *Environmental Review Procedures for the Delaware Water Pollution Control Revolving Fund and Drinking Water State Revolving Fund*, issued September 17, 1991 and revised February 1, 1999. A section of that document is labeled “Appeal” and states that “[a]ny person whose interest is substantially affected by any action of the Secretary may appeal to the Environmental Appeals Board.....” DNREC acknowledges that this appears to provide a right to appeal decisions involving the revolving fund, but these are only guidelines, not regulations. DNREC argues that only the General Assembly can grant jurisdiction to the Board, so these guidelines cannot.

DNREC also argued that the appeal must be dismissed because it was untimely. The deadline for filing an appeal under 7 *Del. C.* § 6008(a) is twenty (20) days after publication of the decision, which occurred on January 5, 2015. Twenty days thereafter was Sunday, January 25; however, this appeal was filed by Surfrider on Monday, January 26, 2015.

DNREC argued that while Superior Court Rules provide that when a prescribed time period ends on a Sunday, the period is extended until the next day on which the Prothonotary is open, this is limited to Superior Court, and there is no such general rule for administrative agencies provided elsewhere in the Delaware Code.

DNREC notes that the General Assembly expressly stated in the statute relating to unemployment compensation: “When the day, or the last day, for doing any act required to be done falls on a Saturday, Sunday or a holiday, the act may be done on the next ensuing day that is not a Saturday, Sunday or holiday.” *See* 19 *Del. C.* § 3304. Therefore, DNREC argues, the General Assembly could have provided similarly for



appeals to the EAB, but did not. DNREC maintained that this appeal could have been timely filed by email or facsimile on the weekend deadline date, even though the EAB administrative offices were closed at that time. In addition, at the time the appeal was filed, Surfrider did not yet have an attorney seeking an extension of time to file the appeal.

While Surfrider claims that an administrative assistant at the EAB advised it that the Appeal could be filed on Monday, January 26, a day beyond the 20-day deadline, DNREC argues that the contact with the administrative assistant was an improper *ex parte* communication, and did not justify filing the appeal late.

#### **Summary of Surfrider's Position**

Surfrider argues that this action was taken under 29 *Del. C.*, ch. 80 and 29 *Del. C.* § 8003 requires that the Secretary take action in accordance with its terms. § 8003(12) empowers the Secretary to administer the state revolving loan program. § 8003(12)(c)(6) provides that the Secretary shall conduct an environmental review of projects qualifying under this section consistent with the review standards and procedures established in Title 7. Surfrider notes that the ROD itself provides: “The ROD is a procedural action under Delaware Code Title 29 § 8003 Powers, duties and functions of the Secretary.” (ROD at 5.). Thus, the appeal under 7 *Del. C.* § 6008 is proper, as this is clearly an “action” of the Secretary.

Since, as DNREC points out, sections of law outside of Chapter 60 call for appeals to the EAB under § 6008, appeals under that section are not limited to decisions under Chapter 60. While other statutes may expressly provide for an appeal under § 6008, that

does not mean the power of the EAB to consider an appeal under § 6008 is limited to those sections.

Surfrider also argues that DNREC mentioned in its motion to dismiss that the environmental review procedures published by DNREC in 1991 and amended in 1999 authorize an appeal of this type of decision. Even if these guidelines are not the equivalent of a statute, the existence of the guidelines shows that DNREC itself believed that issues relating to the revolving loan program were appealable.

In regard to the timeliness issue, Surfrider responded that it is the common accepted practice of all Delaware courts and in a vast array of jurisdictions throughout the country to automatically extend filing deadlines which fall on a Saturday, Sunday or legal holiday. Nothing in EAB regulations specify the procedure to be followed when a deadline falls on a weekend or holiday, and the regulations do not indicate that the Board does not accept this common practice of accepting an appeal on the first business day after a deadline which falls on a weekend or holiday.

In addition, Surfrider contends that one of its representatives, John Weber, contacted the Board's administrative assistant on Monday, January 26 and asked if the Appeal could be filed that day and was told that this would be allowed. The EAB accepted its filing fee on Monday, January 26, 2015 and therefore the Appeal must be considered timely filed.

Further, Surfrider argues that the contact with the Board's administrative assistant was not improper and did not require an attorney. It was not a request for an extension, but was simply an attempt to confirm that filing the appeal on Monday after the Sunday deadline was appropriate.

### **Findings of Fact and Conclusions of Law**

The Board carefully considered the motion to dismiss for lack of subject matter jurisdiction and accompanying memorandum, as well as the response filed by Surfrider. The Board also carefully considered the arguments presented by counsel at the hearing. The Board deliberated in executive session pursuant to 7 *Del. C.* § 6008(a).

As a threshold requirement in any proceeding before the Board, subject matter jurisdiction must be established. As the appellant, Surfrider has the burden of proof to establish subject matter jurisdiction and was unable to do so. Absent such jurisdiction, the Board has no authority to take action. *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1994).

The Board concludes that it does not have subject matter jurisdiction to consider the Appeal. The Board does not have subject matter jurisdiction over any and all challenges to actions of the Secretary. The Board's jurisdiction is limited by 7 *Del. C.* §6008(a) as well as several other provisions in Title 7 in other chapters conferring jurisdiction on the Board.

“[N]o party has a right to appeal unless the statute governing the matter has conferred a right to do so.” *Ibid.* at 900. The Secretary's decision to approve the City for a possible loan was under 29 *Del. C.* § 8003(12). There is no language in that statute providing for an appeal to the Board. “...[W]here the legislature is silent, a court will not graft additional language onto the statute because such action would place the court in a position of making law.” *Goldstein v. Municipal Court for City of Wilmington*, 1991 WL 53830 at 5 (Del. Super. Ct. Jan 7, 1991). Just as a court cannot add to a statute, neither can the Board.

While 7 Del. C. § 6008 (a) provides that “[a]ny person whose interest is substantially affected by any action of the Secretary may appeal” to the EAB, similar or identical language appears in many other statutes. For example, 7 Del. C. §§ 6610 (relating to appeals from matters relating to wetlands) and 7412 (relating to underground storage tanks). It therefore appears that the General Assembly specifically stated when appeals may be made to the Board. By not using this appeal language in 29 Del. C. § 8003(12), we conclude that the General Assembly did not intend to allow appeals to the Board under that section.

The Board rejects Surfrider’s argument that because § 6008(a) contains no qualifying language the phrase “any action of the secretary” encompasses and includes any legally required action of the Secretary. As stated in our opinion in *Sierra Club and Delaware Audubon v. Department of Natural Resources and Environmental Control of the State of Delaware and Delaware City Refining Company, LLC*, (Appeal No. 2013-06), issued April 8, 2014 at 18-20:

This Board does not have general subject matter jurisdiction over *any* and *all* challenges to---and appeals of--- DNREC’s actions or those of the Secretary. The Board’s jurisdiction is limited and conferred by § 6008(a), as well as several other Title 7 statutory provisions outside of Chapter 60 conferring original and appellate jurisdiction on the Board....

...We find that no qualifying language is necessary because the Board is created under--- and derives its jurisdictional authority from---Chapter 60 and the phrase is therefore limited to actions arising thereunder.... [W]here the General Assembly has conferred jurisdiction to the Board beyond Chapter 60, it has done so explicitly. To adopt such a broad interpretation of § 6008(a) and conclude its scope goes beyond Chapter 60 to *any* action of the Secretary would be treating all other provisions that confer jurisdiction on the Board as surplusage (i.e., redundant and unnecessary). Basic tenets of statutory construction instruct us to reject that approach. (Emphasis in the original.)

We also conclude that the ROD was not a final decision authorizing the ocean outfall of the City's treated wastewater. Rather, it only approved the granting of a loan to the City after finding that environmental issues DNREC had with the proposal had been satisfied by the City. Had the Secretary not approved of the loan, the City remained free to seek financing elsewhere.

In addition, various other permits will be required before construction can begin. There will be further public hearings before these permits can be granted and Surfrider will have the right to appeal to the Board again if certain permits are granted.

On the issue of the timeliness of the appeal, the Board by majority vote holds that the appeal was not timely filed. Section 6008(a) provides that any appeal must be filed "within 20 days after publication of the decision." A press release announcing that the Secretary had signed this ROD was made on January 5, 2015 and thus that was the date of publication of the decision. Twenty days thereafter was Sunday, January 25. Had the General Assembly wished to allow an appeal to be filed after a deadline falling on a holiday or weekend, it could have expressly allowed it. It did so in regard to unemployment compensation matters in 19 *Del. C.* § 3304, as noted above.

The Board also finds from the affidavit of John Weber submitted by Surfrider that Surfrider's first contact with the Board's administrative assistant was a telephone call on January 26, asking if the appeal could be filed that day, which was already 21 days after the publication of the decision.

The Board recognizes that Delaware Courts by rule allow for filing of papers on the first business day following a due date falling on a weekend or holiday. The Board believes rules of Delaware courts govern actions in those courts, but do not necessarily

apply to administrative agencies. The Board therefore dismisses this appeal as untimely. Had the General Assembly wanted this admittedly widely accepted rule to apply to EAB appeals, it would have expressly allowed it. *Draper King Cole v. Malave*, 743 A.2d 672 (Del. 1999).

The vote for dismissal relating both to the argument relating to statutes and to the argument relating to timeliness is 4-2. In both cases, the dissenting votes were cast by Board members Sebastian LaRocca and Gordon Wood. Therefore, the Board dismisses this Appeal due to a lack of subject matter jurisdiction.

IT IS SO ORDERED this 16<sup>th</sup> day of September, 2015.

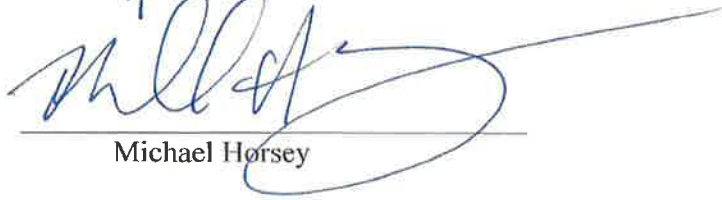
The following Board members concur in this decision.

Date: September 3, 2015

  
Nancy J. Shevock  
Chairperson

Environmental Appeals Board  
Appeal No. 2015-02 (Surfrider Foundation)

Date: 9/16/15




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Michael Horsey

Environmental Appeals Board  
Appeal No. 2015-02 (Surfrider Foundation)

Date: 9/26/15

  
\_\_\_\_\_  
Andrew Aerenon

Environmental Appeals Board  
Appeal No. 2015-02 (Surfrider Foundation)



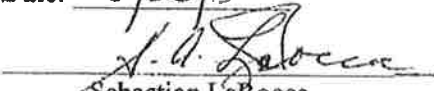
Date: 9-10-2015

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Dean Holden  
Environmental Appeals Board  
Appeal No. 2015-02 (Surfrider Foundation)

The following Board members dissent from this decision. .

Date: 8/28/15

  
Sebastian LaRocca  
Board Member

Environmental Appeals Board  
Appeal No. 2015-02 (Surfrider Foundation)

Date: September 3, 2015

I believe the authorization in the statute establishing the Environmental Appeals Board clearly authorizes the Board to address this appeal. The words are clear on their face. I strongly dissent from the Board's decision on this issue.

I also believe the 20 day submittal requirement works both to preclude late submittals of appeals and to provide the twentieth day for appellants. In this case normal procedures everywhere provide that the twentieth day must be a working day. A question, who was available at DNREC on day twenty to answer the question relative to submittal date? I strongly dissent from the Board's decision. This is a matter the Legislature must address in the near future.

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Gordon Wood  
Environmental Appeals Board  
Appeal No. 2015-02 (Surfrider Foundation)