

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

SUZANNE E. P. THURMAN)	
)	
Appellant,)	
)	
v.)	EAB Appeal No. 2017-09
)	
DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL,)	
)	
Appellee,)	
)	
CITY OF REHOBOTH BEACH,)	
)	
Intervenor-Appellee.)	

DECISION AND FINAL ORDER

Pursuant to due and proper notice of time and place of hearing served on all parties in interest and to the public, the above-stated cause of action came before the Environmental Appeals Board (“Board”) on January 9, 2018, in the Auditorium of the Richardson & Robbins Building, located at 89 Kings Highway, Dover, Kent County, Delaware.

Members of the Board present and constituting a quorum were: Dean Holden (Chair), Michael Horsey, Robert Mulrooney, Sebastian LaRocca, Frances Riddle and Guy Marcozzi. No Board Members disqualified themselves or were otherwise disqualified. Deputy Attorney General Kevin P. Maloney represented the Board.

Appellant Suzanne E.P. Thurman (“Appellant”) appeared pro se. Deputy Attorney General William J. Kassab represented Appellee Delaware Department of Natural Resources and Environmental Control (“DNREC”) and Glenn Mandalas, Esquire represented the City of Rehoboth Beach (“Rehoboth”).

STATEMENT OF THE CASE AND PROCEEDINGS

On May 25, 2017, DNREC issued Secretary's Order No. 2017-W-0014 (the "Ocean Outfall Order" or the "Order") which issued several permits to Rehoboth authorizing the City to construct and operate an ocean outfall to dispose of its treated effluent from its wastewater treatment facility.

On June 13, 2017, the Appellant filed a Notice of Appeal pursuant to 7 *Del. C.* §§ 6008 and 6009 (the "Appeal"). Appellees filed Motions to Dismiss on both lack of standing and lack of subject matter jurisdiction grounds.

MATTERS BEFORE THE BOARD

Prior to the hearing of evidence and argument on the merits of the appeal, the Board considered DNREC's and Rehoboth's Motions to Dismiss for lack of standing and subject matter jurisdiction. The Board also considered Appellant's written response to the Motions to Dismiss. DNREC and Rehoboth presented oral argument on their respective motions (in favor of dismissal), followed by oral argument by Appellant in opposition to the motions (in opposition to dismissal).

A. DNREC and Rehoboth's Motion to Dismiss

In its Motion to Dismiss, which Rehoboth joins, DNREC requests that the Board dismiss Appellant's appeal. DNREC argues in its motion and before the Board that the Appellant does not have standing pursuant to the statutory requirement set forth in 7 *Del. C.* §6008(a) to pursue her appeal. Specifically, DNREC argues that the Appellant is not "substantially affected" by the Secretary's Order, as required by the express language in § 6008(a) as interpreted by the Delaware Supreme Court in the case of *Oceanport Industries, Inc. v. Wilmington Stevedores*,¹ because Appellant has not suffered an "injury-in-fact". DNREC contends that, to invoke standing before the Board, the Appellant's injury cannot be an injury or harm suffered or shared by the public

¹ 636 A. 2d 892 (Del. 1994).

generally. Rather, the Appellant must prove that the injury is “concrete and particularized” and “actual or imminent” and not “conjectural or hypothetical”, as required by the standard established by *Oceanport Industries*. DNREC distinguishes this stricter standard from the broader, more generalized standard applicable to the public hearing stage of the permit process. DNREC contends that the Appellant has failed to satisfy her burden of proof to establish standing and therefore her appeal must be dismissed.

DNREC and Rehoboth also argue in their Motions to Dismiss that the Board lacks subject matter jurisdiction over the appeal and that the lack of subject matter jurisdiction should act independently from the issue of standing and deprive the Board of authority to adjudicate the appeal.

B. Appellant’s Response To DNREC and Rehoboth’s Motions To Dismiss

Appellant requests that the Board deny the DNREC and Rehoboth Motions to Dismiss. Appellant testified that she has been a resident of coastal Delaware since 1970 and that she is the founding director of the Marine Education, Research and Rehabilitation Institute (“MERR”) which is the “official authorized stranding response organization for marine mammals and sea turtles which strand in Delaware.”

Appellant acknowledged that she is proceeding pro se due to difficulty finding an attorney without a conflict of interest and because MERR could not afford to retain an attorney to prosecute the appeal. Appellant testified that she has been providing comments on the proposed outfall since 2009. The Appellant acknowledged that she is not asking for a reversal of the Secretary’s Order, rather she is seeking the imposition of additional mitigation measures. Appellant testified that her “interests and concern in protecting the marine environment far exceeds that of the average citizen

based on the personal time, finances, and other resources” she has contributed to marine ecosystem preservation.

Appellant claimed that the “ongoing cumulative impacts of the operation of the outfall will cause [her] direct harm and suffering due to the undue burden” that will lead to an increased number of responses.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board entered into executive session as permitted by 7 *Del. C.* §6008(a) to deliberate and consider the parties written submissions, and the arguments presented. By a vote of 5 to 1, the Board granted Appellee’s Motion to Dismiss, on the basis that the Appellant has failed to meet her burden of proof to establish standing to bring this appeal for the reasons which follow. By granting the Motion to Dismiss for lack of standing, the additional Motion to Dismiss made by DNREC and Rehoboth on subject matter jurisdiction grounds, is rendered moot and therefore need not be decided by the Board.²

As noted *supra*, the statutory requirements for standing to bring an appeal before this Board are set forth in § 6008(a) and in the Board’s regulations. Section 6008(a) states, in relevant part: “Any person whose interest is substantially affected by any action of the Secretary may appeal to the Environmental Appeals Board within 20 days after receipt of the Secretary’s decision or publication of the decision.”

In essence, the dispositive issue on the motions to dismiss for lack of standing is what the statutory term “substantially affected” means and, based on that meaning, whether the Appellant’s

² A motion to dismiss is a case dispositive motion. Absent a showing of standing by an Appellant, this Board does not have jurisdiction to hear an appeal.

interests are “substantially affected” by the Secretary’s Order. The Delaware Supreme Court directly addressed this question in the *Oceanport Industries, Inc. v. Wilmington Stevedores*, which is applicable legal precedent that this Board is bound to follow.

In *Oceanport Industries*, the Court noted that the General Assembly had not defined the term “substantially affected” when it enacted § 6008(a). The Court also noted that the General Assembly “provided a role for the participation of the general public in the protection of natural resources by establishing a minimal standing requirement for involvement in hearings during permit process”, citing § 6004(b).³ Once a permit has issued, as Permit No. 2017-W-0014 has in this matter, the standing requirement “becomes the more stringent ‘substantially affected’ test...” To that end, the Court held that a party must show in “injury in fact” and that such injury is within the zone of interest sought to be protected by the statute.

Furthermore, in a later case appealed from a decision of this Board, the Delaware Superior Court, in *Eastern Shore Environmental, Inc. v. Delaware Solid Waste Authority*⁴, similarly set forth the requirements for standing before this Board. The Superior Court, citing the prior holdings of the Delaware Supreme Court in *Oceanport Industries* and *Dover Historical Society v. City of Dover Planning Commission*⁵, held that an “‘injury in fact’ is an *invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.*” (Emphasis added).

Under *Oceanport Industries*, the Appellant bears the burden of proof to establish standing and is required to show that she has suffered an injury in fact and that such injury is within the

³ Section 6004(b) states, in pertinent part, “The Secretary shall hold a public hearing on an application, if he or she receives a meritorious request for a hearing within a reasonable time as stated in the advertisement” and “[a] public hearing may be held on any application if the Secretary deems it to be in the best interests of the State to do so” and “[a] public hearing request shall be deemed meritorious if it exhibits a familiarity with the application and a reasoned statement of the permit’s probably impact.”

⁴ 2004 WL 440413 (Del. Super. Feb. 26, 2004)

⁵ 838 A.2d 1103 (Del. 2003)

zone of interest sought to be protected (*i.e.*, that she has been “substantially affected” by the Secretary’s Order). Appellant’s evidentiary showing and argument (written and oral) before the Board, however, have failed to establish that she personally has been “substantially affected” by the Secretary’s Order, based on the statutory requirement for standing as set forth in § 6008(a), as the term “substantially affected” has been interpreted and defined by the Delaware Courts.

The Board finds Appellant has been a resident of coastal Delaware since 1970. She is the founding director of the Marine Education, Research and Rehabilitation Institute (“MERR”). MERR is a stranding response organization for marine mammals and sea turtles that strand in Delaware. The Board finds that Appellant is proceeding *pro se* and not on behalf of MERR.⁶ The Board accepts Appellant’s testimony that MERR could not bear the financial liability of hiring counsel and encountered conflict of interest issues when it attempted to retain counsel to represent MERR. The Board commends Appellant for her commitment and passion to the cause of stranded marine animals and appreciates her heartfelt presentation of her case. It cannot, however, find that Appellant has suffered an injury as a result of the ocean outfall that is “particularized and concrete” or distinguishable from the public at large. Regardless of how sincere the Appellant’s interest is in preserving the marine environment, her legally protected interest in the ocean is no different from any other member of the public’s legally protected interest in the ocean. Appellant has not pointed to anything in the Secretary’s Order that substantially affects her legally protected interests. Nothing in the Secretary’s Order affects Appellant in a personal or individual manner as compared to the Order’s impacts on the general public.

⁶ In Delaware, artificial entities must be represented by counsel. *See Transpolymer Indus., Inc. v. Chapel Main Corp.*, 582 A.2d 936 (table) (Del. Sep.18, 1990).

In light of the facts alleged in Appellant's Statement of Appeal, the facts alleged in her written response to the motions to dismiss, as well as the evidence presented at the hearing, all viewed in a light most favorable to Appellant, the Board finds that the Appellant has not established that she has been "substantially affected" by the Secretary's Order. Appellant's contentions, while articulately presented, are not distinguishable from those that could be raised by the general public. Appellant is, in essence, advocating for the public at large and has provided no factual basis to demonstrate that she has a unique personal stake in the matter and that her "injuries" are concrete and particularized, and more than generalized concerns regarding potential environmental harms. Thus, Appellant has no standing to pursue her appeal and the motion to dismiss for lack of standing is properly granted.

IT IS SO ORDERED, this _____ day of April, 2018.

Dean Holden, Chairperson

The following five Board members concur in this decision.

Date: _____

Robert Mulrooney
Board Member

Date: _____

Michael Horsey
Board Member

Date: _____

Frances Riddle
Board Member

Date: _____

Guy Marcozzi
Board Member

The following Board member does not concur in the decision.

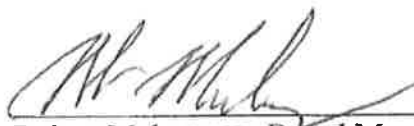
Date: _____

Sebastian LaRocca
Board Member

Date: 3/9/2018


Dean Holden, Chairperson

Date: 4/8/2018



Robert Mulrooney, Board Member

Date: 4/2/18


Michael Horsey, Board Member

Date: 4/2/18



Frances Riddle, Board Member

Date: 4/4/18



Guy Marcozzi, Board Member

Date: April 3, 2018


Sebastian LaRocca, Board Member