

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

DELAWARE SOLID WASTE
AUTHORITY,

Appellant,

v.

DELAWARE DEPARTMENT of
NATURAL RESOURCES and
ENVIRONMENTAL CONTROL,

Appellees.

EAB Appeal Nos.: 2018-06; 2018-05

DECISION AND FINAL ORDER

Pursuant to due notice and in accordance with the Delaware Administrative Procedures Act, a public hearing was convened by the Environmental Appeals Board (“EAB” or “Board”) on January 22, 2019 in the auditorium of the Richardson & Robbins Building, located at 89 Kings Highway, Dover, Delaware on the appeal filed by the Appellants challenging the issuance of two Notices of Violation by the Delaware Department of Natural Resources and Environmental Control.

Members of the Board present and constituting a quorum at the January 22, 2019 public hearing included Chairperson Dean Holden, Fran Riddle, Guy Marcozzi, Michael Horsey, Robert Mulrooney, and Sebastian LaRocca. Deputy Attorney General Patricia Davis advised the Board. The Appellant was represented by Michael W. Teichman, Esquire and Elio Battista, Jr., Esquire and the Appellees were represented by Deputy Attorney General William J. Kassab.

Nature and Stage of the Proceedings

The Delaware Department of Natural Resources and Environmental Control (“DNREC”) issued a Notice of Violation, 18-SW-58, to the Delaware Solid Waste Authority (“DSWA”) on September 20, 2018. On October 16, 2018, the DSWA filed an appeal of NOV 18-SW-58 to the Environmental Appeals Board. The EAB assigned this appeal case number 2018-05.

On October 2, 2018, DNREC issued a second NOV to DSWA, 18-SW-65. On October 18, 2018, DSWA filed an appeal of NOV 18-SW-65 with the Environmental Appeals Board. The EAB assigned this appeal case number 2018-06.

On December 24, 2018, DNREC filed a motion to dismiss both of DSWA’s appeals to the EAB. DSWA responded on January 14, 2019 with an opposition to the DNREC’s Motion to Dismiss. The Environmental Appeals Board heard the combined Motion to Dismiss and Response on January 22, 2019.

Positions of the Parties

DNREC motion is to dismiss EAB appeals 2018-06 and 2018-05. DNREC’s basis for seeking dismissal is that the appeals are outside of this board’s jurisdiction. *7 Del. C. § 6008* requires that an appellant demonstrate they have been substantially affected by a final decision of the Secretary. In *Bennet v. Spear*, 520 U.S. 154 (1997), the Supreme Court of the United States held that in order for an agency action to be final, the action must mark the consummation of the agency’s decision-making process, and it must be one by which rights or obligations have been determined or from which legal consequences will flow. DNREC maintains that NOV’s are not the final decision of the agency and they determine no rights or obligations. NOV’s are not the “consummation of the decision

making process.” Rather, NOV’s provide the steps that may be taken by an entity in order to correct the violation. If the violator comes into voluntary compliance, there is no final decision made. Here, one of these situations was remedied and no final decision was issued. In order for the Department to impose legal sanctions such as an administrative penalty, it must be issued via Secretary’s order. The NOV does not carry the same consequences and an additional step is required before sanctions may be imposed, and thus the NOV is not the final decision. The General Assembly provided the Department the ability to seek voluntary compliance, but said that engaging in voluntary compliance attempts does not preclude the Department from seeking compulsory enforcement action. If NOV’s are found to be final decisions, the Department’s ability to engage in voluntary compliance will be frustrated. In the compliance enforcement response guide, there is a discussion about the difference between an NOV and an administrative penalty. The Department’s own policy makes clear that NOV’s are not final decision. NOV’s are public, however, this is a requirement of law. Specifically, 7 *Del. C.* § 6014 requires that information concerning violations be made publically available. This information is routinely updated and one agency is not singled out. The fact that the NOV’s are public does not mean that they are final decisions. NOV’s do not carry legal consequences, they are used for voluntary compliance. If an entity receives an NOV and they disagree with it, they are free to provide their own position to the Department. In fact, DSWA has done this before. DSWA has responded by disagreeing with the findings of the NOV. In the past, the Department has removed violations when further communications indicate that an actual violation has not occurred. NOV’s are not the sort of actions that substantially affect

DSWA's interest. Here, the Department sent a letter saying there will be no further action on this NOV.

With regard to the chronic violator argument, DNREC maintains that *7 Del. C. § 6005(e)* states that penalties or fines imposed by that Section may be tripled for chronic violators, as the term is defined in Section 7904. However, nothing in the Section 7904 definition of a chronic violator includes the failure to comply with an NOV.

Finally, DNREC reiterates that if an NOV is ignored, there is no fine or other sanction automatically imposed, the Department must first pursue an administrative penalty order against an agency. If a Secretary's order doesn't follow an NOV, no legal consequence is ever imposed against the agency. If an NOV is—as DSWA maintains—a final order that can be appealed, then legal consequence must be inferred from an NOV that is not appealed. Here, for example three NOVs were issued to three separate entities. Only DSWA appealed its NOV. The other agencies did not. After the issuances of these NOVs, the other two agencies were issued Secretary's orders, finding violations and imposing penalties. If NOVs are final decisions of the Secretary, are not these other agencies precluded from challenging the Secretary orders issued against them when they chose to let the NOV “stand” without appeal? The DSWA's position does not lead to clear cognizable appeal rights under Title 7 as a whole.

The Delaware Solid Waste Authority maintains that an NOV is the end of the deliberative process. It is in the form of a formal letter, it is published, and anyone on the listserv can go online and see who is a violator. The Department has determined that there is a violation. That is final. It is a final decision. And it is a decision of the Secretary because only the Secretary can enforce this chapter.

The interest of DSWA are substantially affected because the notice is published on a listserv. Anyone can read about these violations in the paper. There's a difference between making something simply public and actively publishing on a listserv. It depends on the nature of the violation asserted by the Department. A business that relies on customers places great value on their reputation. When the Cape Gazette picks up on the NOV and runs an article, it labels a company as a polluter and that is damaging to that company's reputation.

In the chronic violator statute, there is a disclosure that must be made at the times of application. These disclosures require the identification of Notices of Violation. Presumably, disclosing prior NOVs leads to permits with conditions to address the past practice of violations. Chronic "violators" are "violators," not chronic recipients of Secretary orders. The number and character of past violations can be used by the Secretary in considering chronic violator status. It is the DSWA's position that all NOVs substantially affect the agency's rights. DNREC's guidance document makes clear that if there is a notice of violation issued for something and an agency engages in that behavior again, the punishment is likely to be more severe. An NOV is a final decision. It's a decision of the Secretary. It may be appealed. There's a lot of noise and smoke about impeding voluntary compliance, but the Department accepts that they have other options such as letters and guidance. The NOV is a final "done deal."

Analysis

The Delaware Department of Natural Resources and Environmental Control issued Notice of Violation 18-SW-58 to the Delaware Solid Waste Authority on September 20, 2018. On October 2, 2018, DNREC issued a second NOV to DSWA, 18-SW-65.

Following the issuance of one NOV, DSWA made changes at its site, and no further action was taken by DNREC. DSWA disputed the findings of the second NOV however, and DNREC issued a subsequent Order of the Secretary. That Order is the subject of another appeal currently pending before this Board. The question before the Board today is whether an NOV standing alone is an appealable action within this Board's jurisdiction to consider. For the reasons discussed herein, the Board finds that NOVs are not appealable under *7 Del. C. § 6008*.

Pursuant to Section 6008(a), any person "whose interest is substantially affected by any action of the Secretary may appeal to the Environmental Appeals Board" Simply stated, NOVs do not substantially affect the agencies to whom they are issued. As DNREC repeatedly asserts, there is no repercussion for the failure to comply with a suggested plan of action in an NOV. If an NOV results in no change of behavior and DNREC wishes to compel a change, it must seek and obtain a Secretary's order. Finally, DSWA's position that NOVs are appealable decisions leads to an absurd result. If NOVs may be appealed to this Board, and the Board determines that the NOV should be affirmed, the recipient agency may still decide not to change its behavior and wait for the issuance of an order of the Secretary. This order could then be appealed again under Section 6008(a). The law does not contemplate two rights of appeal from a single issue to the same appellate body. It cannot be the case that NOVs are final decisions of the agency subject to appellate review.

The Board sympathizes with the agencies and the publicity surrounding NOVs. The statute requires DNREC to publicize NOVs, but knowing that these letters must be publicized, DNREC should be more circumspect in its word choice. The NOVs at issue

here do not say “alleged” violation; they do not say “potential” violations have been noticed. The NOV’s are captioned as “Notice of Violation” and to the untrained eye, appear to be final determinations that a statutory violation has been definitely and finally determined. The Board recognizes there is potential damage to the reputation of the agencies who receive these. DNREC must be “measured” in its use of NOV’s as they are public, publicized, and not subject to appeal.

To that end, the Board sincerely hopes that NOV’s aren’t the first step and that DNREC is using letters of warning and other interim communications before issuing these public non-appealable notices. If, as DNREC argues, NOV’s may subsequently be determined to be unfounded after communication with the agency, this really should be publicized as well.

Accordingly, the DSWA’s appeal of NOV’s 18-SW-58 and 18-SW-65 is dismissed.

It is so ordered this 17th day of April, 2019 by the

Environmental Appeals Board:

Dean Holden, Chairperson

Robert Mulrooney, Board Member

Michael Horsey, Board Member

Frances Riddle, Board Member

Guy Marcozzi, Board Member

Sebastian LaRocca, Board Member

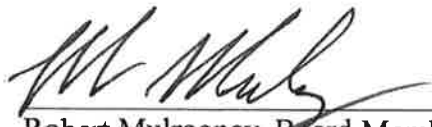
EAB Appeal Nos. 2018-05; 2018-06 Decision and Final Order

Date: 4/17/2019


Dean Holden, Chairperson

EAB Appeal Nos. 2018-05; 2018-06 Decision and Final Order

Date: 4/17/2019



Robert Mulrooney, Board Member

EAB Appeal Nos. 2018-05; 2018-06 Decision and Final Order

Date: 4/23/19



Michael Horsey, Board Member

EAB Appeal Nos. 2018-05; 2018-06 Decision and Final Order

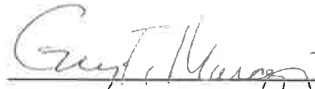
Date: 4/18/19



Frances Riddle, Board Member

EAB Appeal Nos. 2018-05; 2018-06 Decision and Final Order

Date: 4/18/19



Guy Marcozzi, Board Member

EAB Appeal Nos. 2018-05; 2018-06 Decision and Final Order

Date: 04/18/2019

/s/ Sebastian LaRocca
Sebastian LaRocca, Board Member