

BEFORE THE ENVIRONMENTAL APPEALS BOARD FOR
THE STATE OF DELAWARE

DELAWARE COMMUNITY
BENEFITS AGREEMENT
COALITION, MARIE REED, KAREN
CHEESEMAN, SIMEON HAHAN,
JEFFREY RICHARDSON, and DR.
MUJAHID NYAHUMA, THE
PHILADELPHIA REGIONAL PORT
AUTHORITY, GRENWICH
TERMINALS LLC AND WALTER
CURRAN,

Appellants,

v.

STATE OF DELAWARE
DEPARTMENT OF NATURAL
RESOURCES AND
ENVIRONMENTAL CONTROL,

Appellee.

EAB Appeal No. 2021-07
2021-08
2021-09
2021-10
(CONSOLIDATED)

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 September 13, 2022, via remote Web conferencing.

Members of the Board present and constituting a quorum were: Dean Holden (Chair), Frances Riddle, Michael Horsey, and Robert Mulrooney. Deputy Attorney General Kevin P. Maloney represented the Board.

Deputy Attorneys General Devera Scott and Jameson Tweedie represented Appellee Delaware Department of Natural Resources and Environmental Control (“DNREC”). Walter L. Burton, Jr., Esquire and Thomas Hanson, Esquire represented Diamond State Port Corporation (“DSPC”). Thaddeus J. Weaver, Esquire, Shoshana (Suzanne Ilene) Schiller, Esquire and Jill Hyman Kaplan, Esquire represented Appellants Greenwich Terminals LLC, GMT Realty and Gloucester Terminals LLC (“Port Operators”). Andrew S. Levine, Esquire and Joelle E. Polensky, Esquire represented Appellant Port of Philadelphia (“PhilaPort”). Michelle J. Skjoldal, Esquire and David A. Rockman, Esquire represented Appellant Walter Curran (“Curran”).

I. PORT OPERATORS MOTION *IN LIMINE* REGARDING DISCUSSIONS WITH REGULATORY AGENCIES

Port Operators argue that the Board cannot consider matters, including discussions with regulatory agencies, outside the record before DNREC. It also posits that the testimony that DSPC seeks to introduce is not competent evidence because it is unreliable hearsay.

DSPC counters that the testimony is offered to rebut claims that the permitting process was not transparent, was rushed and rubber stamped with information hidden from the public. They also state that the testimony is not offered to prove the truth of the matter asserted and therefore is not hearsay.

In deciding this Motion *in Limine*, the Board considered the written submissions of the Parties, and the oral argument from the Parties. Following the closing arguments by each of the Parties, the Board entered into executive session as permitted by 7 Del. C. § 6008(a) to deliberate and receive legal advice.

After deliberation and careful review of Parties' respective arguments, the Board, by a vote of 4 to 0, **DENIED** the Motion *in Limine* to exclude testimony regarding discussions with regulatory agencies based on the plain language of 7 Del. Admin. C. § 5.3 which states that "Appellants other than permit applicants or an alleged violator may only introduce evidence which was before the Secretary." The Board finds that this language allows permit applicants greater latitude than other parties to allow the admission of evidence not contained in the record before the Secretary.

II. PORT OPERATORS MOTION IN LIMINE REGARDING THE ECONOMIC IMPACT OF THE PROPOSED PROJECT

Port Operators argues that the Board cannot consider proposed testimony from economist Jerry Diamentedes because such testimony is not relevant in that it

does not address navigational hazards associated with the project. In support thereof, they assert that their arguments center on the navigational hazards that the proposed project would create in the Delaware River (“River”).

DSPC responds by highlighting that the economic impact of the project was presented during the public comment period, considered by the Hearing Officer and Secretary in reaching the permit decision and is therefore relevant to the Secretary’s decision.

In deciding this Motion *in Limine*, the Board considered the written submissions of the Parties, and the oral argument from the Parties. Following the closing arguments by each of the Parties, the Board entered into executive session as permitted by 7 *Del. C.* § 6008(a) to deliberate and receive legal advice.

After deliberation and careful review of Parties’ respective arguments, the Board, by a vote of 4 to 0, **DENIED** the Motion *in Limine* to exclude testimony regarding the economic impact of the project based on the plain language of 7 *Del. Admin. C.* § 5.3 and allows the admission of such evidence to the extent it is relevant to and establishes a nexus to evidence before the Secretary.

III. DSPC'S MOTION IN LIMINE TO EXCLUDE EXPERT WITNESS TESTIMONY

DSPC argues that in order to judge the admissibility and reliability of an expert's purported testimony, and so the tribunal can properly conduct its gatekeeper role, Parties should be required to exchange expert reports or submit expert disclosures. It states that here the Port Operators' and Curran's disclosures fail to contain the facts the expert relied on in formulating each opinion, do not mention the method used to formulate the opinions or the grounds of each opinion. Finally, Movant argues that *7 Del. Admin. C. § 5.3* states that "Appellants other than permit applicants or an alleged violator may only introduce evidence which was before the Secretary" and that the Port Operators and Curran are not the permit applicants, nor are they alleged violators.

Curran responds stating he has complied with the Board's regulations regarding identification of witnesses. Further, under *7 Del. Code § 6008(b)*, the record before the Board is to "include the entire record before the Secretary", although all Parties "may produce any competent evidence in their behalf." Accordingly, the record before the Board consists of the "entire record" that was before the Secretary and any other "competent evidence" that the Parties produce during the appeal. *Delaware Solid Waste Authority v. Delaware Dep't of Natural Resources and Environmental Control*, 250 A. 3d. 94 (Del. 2021). As such, and

despite the arguments to the contrary by DNREC and DSPC, the Board has the power to expand the record by accepting “competent evidence” produced by any party to the appeal.

Port Operators add in opposition to the Motion that DSPC possesses not only the expert’s disclosures but also the expert reports that the experts submitted during the public comment period which form the basis of their testimony.

In deciding this Motion *in Limine*, the Board considered the written submissions of the Parties, and the oral argument from the Parties. Following the closing arguments by each of the Parties, the Board entered into executive session as permitted by 7 *Del. C.* § 6008(a) to deliberate and receive legal advice.

After deliberation and careful review of Parties’ respective arguments, the Board, by a vote of 4 to 0, **DENIED** the Motion *in Limine* to exclude expert testimony based on the plain language of 7 *Del. Admin. C.* § 5.3 and allows the admission of such evidence to the extent it is relevant to and establishes a nexus to evidence before the Secretary.

IV. DSPC’S MOTION IN LIMINE TO EXCLUDE TESTIMONY FROM THE DNREC SECRETARY AND HEARING OFFICER

Movant notes that Delaware Rule of Evidence 605 precludes a “presiding judge from testifying at the trial.” D.R.E. 605. *Jones v. State*, 599 A.2d 413 n.1 (Del. 1991) (“Neither the presiding judge nor a member of the jury may testify as

a witness.”) and that allowing the DNREC Secretary and Hearing Officer to testify at the hearing would be prejudicial, destructive of judicial responsibility, and would undermine the integrity of the judicial process. It noted that the Board has refused to issue a subpoena in similar circumstances, without explanation. *See Collazuol v. Tulou*, 1996 WL 65896 (Del. Super. Oct. 31, 1996) (upholding Board’s decision refusing to issue a subpoena for DNREC’s Hearing Officer).

Curran and Port Operators respond that they agree not to call the Secretary but that the Board should make the determination regarding the testimony of the Hearing Officer only when and if she is called. They contend that the testimony of the Hearing Officer may be necessary in order to establish the contents of the record and what was considered by her when drafting her Report.

In deciding this Motion *in Limine*, the Board considered the written submissions of the Parties, and the oral argument from the Parties. Following the closing arguments by each of the Parties, the Board entered into executive session as permitted by 7 *Del. C.* § 6008(a) to deliberate and receive legal advice.

After deliberation and careful review of Parties’ respective arguments, the Board, by a vote of 4 to 0, **GRANTED** the Motion *in Limine* to exclude the testimony of the DNREC Secretary and Hearing Officer based on the fact that the request for the Secretary’s testimony is moot and that the Hearing Officer’s

Recommendation is the best evidence of her reasoning and process and speaks for itself.

V. **DSPC’S AND DNREC’S MOTION *IN LIMINE* TO EXCLUDE TESTIMONY, EVIDENCE OR ARGUMENT REGARDING THE WATER QUALITY CERTIFICATION UNDER SECTION 401 OF THE CLEAN WATER ACT**

Movants argues that testimony, argument or evidence on Section 401 ~~WQC~~ Water Quality Certification (“WQC”) should be excluded under the Law of the Case Doctrine which prevents re-litigation of prior determinations to avoid inconsistent rulings. According to Movant, the doctrine is a “self-imposed restriction that prohibits courts from revisiting issues previously decided, with the intent to promote efficiency, finality, stability and respect for the judicial system.” *Washington v. Del. Transit Corp.*, 226 A.3d 202, 212 (Del. 2020). Movant asserts that the Board’s previous decision to dismiss Curran’s Amended Appeal, and with it the Section 401 WQC issue, was procedurally sound and a final ruling. Finally, DSPC contends that since the Board struck the Section 401 WQC issue from Curran’s appeal, and because no other Appellants raised the issue in their Notice of Appeals, Section 401 WQC is no longer relevant to any matter before the Board. DNREC contends that because Order No. 2021-W/CCE-0026 does not address the 401 WQC, that issue is outside the scope of this appeal and exhibits or testimony related to that issue should be excluded from presentation at the hearing.

The Board has broad discretion in determining what to include or reject from the record and is “empowered to reject certain evidence which it finds cumulative or ‘insubstantial’” and the Board may properly exclude evidence it finds irrelevant. *Collazuol v. Tulou*, 1996 WL 658966, at *10 (Del. Super. Oct. 31, 1996).

Curran argues that the Motion should be denied because it risks barring evidence that relates to DNREC’s failure to respond to the United States Army Corps of Engineers (“USACOE”) regarding the WQC issue and relates to the permit at issue in this appeal. Specifically, Curran points to DNREC’s May 20, 2020, letter to the USACOE which states, among other things that “the size and scope of this project are unlike any other seen in the State of Delaware.”

Port Operators add that the Secretary’s letter contains admissions by the Secretary regarding the unprecedented scope and complexity of the Proposed Project that are directly relevant to the Port Operators’ appeal of the Subaqueous Lands Act permit and Federal Consistency Certification in this proceeding. As the Secretary admitted in the May 20 Letter, “[t]he Diamond State Port application represents a major activity in the State of Delaware, and one of, if not the largest, project that has ever been reviewed for impacts within subaqueous lands.”

In deciding this Motion *in Limine*, the Board considered the written submissions of the Parties, and the oral argument from the Parties. Following the

closing arguments by each of the Parties, the Board entered into executive session as permitted by 7 *Del. C.* § 6008(a) to deliberate and receive legal advice.

After deliberation and careful review of Parties' respective arguments, the Board, by a vote of 4 to 0, **GRANTED** the Motion *in Limine* to exclude testimony regarding the WQC based on lack of subject matter jurisdiction over what is primarily a federal decision-making process.

VI. DSPC'S MOTION IN LIMINE TO EXCLUDE EVIDENCE THAT WAS NOT BEFORE THE SECRETARY

DSPC argues that based on controlling authority, Appellants, who are not the permit applicants or alleged violators, are prohibited from introducing such evidence during the hearing. The Port Operators and Curran have included numerous experts on their witness lists, and Curran has included several exhibits for those experts, that go far outside the record before the Secretary and, therefore, are outside the scope of this appeal. According to DSPC, Delaware courts' view on the record review as strictly limited and accordingly the reviewing tribunal has no authority on appeal to make independent findings of fact. DSPC also contends that the issue of maintenance dredging is not ripe for adjudication because the permit application that DSPC submitted, and the permit DNREC issued, was a construction permit and not a maintenance dredging permit.

PhilaPort argues that the Delaware Supreme Court has held that “the Rules of Evidence do not strictly apply to administrative hearings. Rather, the agency may hear ‘all evidence which could conceivably throw light on the controversy.’” *Delmarsh, LLC v. Environmental Appeals Board*, 277 A.3d 281, 289 (Del. 2022) (quoting *Tenaglia-Evans v. St. Francis Hosp.*, 913 A.2d 570, 2006 WL 3590385, at *3 (Del. 2006)). It also contends that its proposed expert witness testimony will be helpful to the Board in adjudicating this appeal.

Curran notes that the strict rules of evidence do not apply to Board proceedings and the inclusion of relevant and reliable expert testimony is appropriate in this matter. According to Curran, the experts identified in his July 29, 2022 witness list - namely, Mr. Preziosi, Dr. Jones, and Dr. Tomasi - as well as documents identified under the headings “Documents associated with Expert Witness qualifications” and “Expert witness testimony documents” in his July 29, 2022 exhibit list, are admissible at the hearing in his matter under the Board’s rules and case law.

In deciding this Motion *in Limine*, the Board considered the written submissions of the Parties, and the oral argument from the Parties. Following the closing arguments by each of the Parties, the Board entered into executive session as permitted by 7 *Del. C.* § 6008(a) to deliberate and receive legal advice.

After deliberation and careful review of Parties' respective arguments, the Board, by a vote of 4 to 0, **DENIED** the Motion *in Limine* to exclude testimony that was not in the record before the Secretary to the extent it is relevant to and establishes a nexus to evidence before the Secretary.

VII. DNREC'S MOTION IN LIMINE TO EXCLUDE NAVIGATION EVIDENCE

DNREC contends that the only aspect of navigation that is relevant to this permitting process is the requirement in Section 4.6.3 of the Regulations that, as part of its consideration of the public interest, Department consider "[t]he potential effect on the public with respect to commerce, navigation, recreation, aesthetic enjoyment, natural resources, and other uses of the subaqueous lands." This means DNREC claims that the only evidence that can be considered on navigation is evidence that is on the record before the Secretary. DNREC contends it need only consider navigation in relation to the construction of the container port and not traffic above or below the site.

Port Operators argue that navigation is relevant because it is one of the issues that must be considered in evaluating a subaqueous lands permit application and DNREC's analysis of the navigation issue was inadequate especially considering the Port Operators' evidence concerning navigation was in the record before DNREC.

Curran contends that impacts from navigational concerns such as the effects of commercial traffic entering and exiting the Port on recreational boating using the same stretch of the River are relevant issues in this appeal.

Port Operators contend that DNREC's emphasis on commercial navigation and assertion that it need only consider navigation in relation to the construction of the port and not traffic above or below the site, ignores the plain meaning of navigation as well as the fact that the Port Operators' concerns arise from impacts on navigation that are anticipated to occur at and directly adjacent to the area of the Proposed Project.

In deciding this Motion *in Limine*, the Board considered the written submissions of the Parties, and the oral argument from the Parties. Following the closing arguments by each of the Parties, the Board entered into executive session as permitted by 7 *Del. C.* § 6008(a) to deliberate and receive legal advice.

After deliberation and careful review of Parties' respective arguments, the Board, by a vote of 4 to 0, **DENIED** the Motion *in Limine* to exclude testimony regarding navigation finding that navigation issues are relevant to the permitting decision.

VIII. DNREC'S MOTION IN LIMINE TO EXCLUDE EVIDENCE NOT IN THE RECORD

DNREC argues that the Board's regulations are clear that "[A]ppellants other than permit applicants or an alleged violator may only introduce evidence which was before the Secretary." 7 Del. C. § 105-5.3. In other words, according to DNREC, Appellants cannot offer evidence or interpose issues which could have been added to the record during the public hearing comment period but were not. To succeed on an appeal, "an appellant must prove to the Board that the Secretary lacked evidence to support his decision" and cannot succeed merely by showing there is technical evidence which the Secretary rejected. *Tulou v. Raytheon Service Co.*, 659 A.2d 796, 805-6 (Del. Super. 1995). DNREC respectfully requests the Board issue an order excluding Appellants from presenting any witnesses or offering any documentary evidence that was not on the record before the Secretary.

PhilaPort argues that the rules of evidence do not apply to Board proceedings and that the Board's enabling statute and regulations allow for relevant and reliable expert testimony to be presented and that such testimony will be helpful to the Board.

Similarly, Port Operators that, whereas here, complex technical issues relating to dredging operations and navigation are at issue the presentation of such evidence live at the hearing will satisfy the "helpful" threshold.

In deciding this Motion *in Limine*, the Board considered the written submissions of the Parties, and the oral argument from the Parties. Following the

closing arguments by each of the Parties, the Board entered into executive session as permitted by 7 Del. C. § 6008(a) to deliberate and receive legal advice.

After deliberation and careful review of Parties' respective arguments, the Board, by a vote of 4 to 0, **DENIED** the Motion *in Limine* to exclude testimony that was not in the record before the Secretary to the extent it is relevant to and establishes a nexus to evidence before the Secretary.

IT IS SO ORDERED, this 12th day of December, 2022

Date: 12/12/2022 /s/ Dean Holden
Dean Holden, Chairperson

The following three Board members concur in this decision:

Date: 12/9/2022 /s/ Robert Mulrooney
Robert Mulrooney, Board Member

Date: 12/12/2022 /s/ Michael Horsey
Michael Horsey, Board Member

Date: 12/5/2022 /s/ Frances Riddle
Frances Riddle, Board Member

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CERTIFICATE OF SERVICE

I, Dean Holden, Environmental Appeals Board Chairman, hereby certified that on December 12, 2022, I caused true and correct copies of the foregoing Order to be served on the following:

<p><i>Via Certified Mail/Return Receipt</i> Marie Reed 1111 D Street Wilmington, DE 19801 <i>Individual Appellant</i></p>	<p><i>Via Certified Mail/Return Receipt</i> Karen Cheeseman 31 South Pennewell Drive Wilmington, DE 19809 <i>Individual Appellant</i></p>
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<p><i>Via Certified Mail/Return Receipt</i> Simeon Hahn 501 Lennox Road Wilmington, DE 19801 <i>Individual Appellant</i></p>	<p><i>Via Electronic Mail and Certified Mail/Return Receipt</i> Jeffrey Richardson 700 West 21st Street Wilmington, DE 19802 info@delcbac.org <i>Individual Appellant</i></p>
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/s/ Dean Holden _____

Chair

