

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

VETERANS SERVICES,	:	
	:	
and	:	
	:	Appeal No. 2024-02
CLEAN AND FRESH ENVIRONMENTAL	:	
SERVICES, INC.,	:	
	:	
<i>Appellants,</i>	:	
	:	
v.	:	
	:	
DEPARTMENT OF NATURAL RESOURCES	:	
AND ENVIRONMENTAL CONTROL,	:	
	:	
<i>Appellee.</i>	:	
	:	

ORDER GRANTING APPELLEE’S MOTION TO DISMISS

Pursuant to due and proper notice of the time and place of hearing served on all parties in interest, and to the public, the above-captioned Appeal came before the Environmental Appeals Board (the “Board”) on July 16, 2024. The hearing was convened at the Kent County Levy Court Building, located at 555 Bay Road, Dover, Delaware. A virtual attendance option was also provided.

Members of the Board present and constituting a quorum were: Dean Holden (Chairperson); Michael Horsey; Randall Horne; Guy Marcozzi; Michael Houghton;

and Deborah Wicks. Deputy Attorney General A. Zachary Naylor represented the Board joined by the Board’s administrative liaison, Janella Sapp.

Appellee, Delaware Department of Natural Resources and Environmental Control (“DNREC”) was represented by Deputy Attorney General Valerie Edge (argued).

As discussed below, Appellants were not represented by counsel. Mr. Joseph Walls, purported to be the sole proprietor of Veterans Services, appeared on that entity’s behalf and made argument. Brother George X, CEO of Clean and Fresh Environmental Services, Inc. (“Clean and Fresh”) was present on behalf of that entity.

The Appeal challenges DNREC Secretary Order No. 2024-A-0010 (the “Secretary’s Order”), issued March 12, 2024. The Secretary’s Order concerns the application of Normaco, Inc. for a “natural minor construction permit.”

The Board received the Appeal on April 5, 2024. Appellee moved to dismiss the Appeal (the “MTD”) on three grounds: the Appeal was not filed in a timely manner; the Appellants are ‘artificial entities’ not represented by legal counsel; and the Appellants lack standing to bring the Appeal.

Prior to the July 16, 2024 hearing and in accordance with the Board’s Regulations, DNREC provided the Board with the chronology (*7 Del. Admin. Code* §105-4.0) consisting of the record before the Secretary with respect to the

Secretary's Order. In deciding this MTD, in addition to considering the chronology, the Board considered the written submissions of the parties, including supplemental electronic mail and documentation submitted by Veterans Services, and the oral argument from DNREC and Veterans Services.

No formal argument was permitted on behalf of Clean and Fresh. During the pre-hearing conference, Clean and Fresh did not appear represented by a Delaware attorney. In addition, Clean and Fresh did not submit any written response to the MTD. Likewise, at the hearing on July 16, 2024, Clean and Fresh was not represented by counsel. Brother George X, CEO of Clean and Fresh, asked that the Board consider Mr. Walls (appearing, as sole proprietor of Veterans Services) to act as representative of Clean and Fresh. However, a non-attorney cannot represent a corporate entity, such as Clean and Fresh.

Only Veterans Services responded to the Motion to Dismiss. Veterans Services was, for the purpose of the Motion to Dismiss, represented by its "sole proprietor," Mr. Walls. Although Brother George X sought, during the hearing, to have Clean and Fresh join in Veterans Services' opposition, Mr. Walls cannot act as Clean and Fresh's representative in a legal action. Moreover, because Clean and Fresh is a Delaware corporation, Brother George X cannot act as its representative in a legal action.

Brother George X was permitted to state his position on the record.

Representation by Legal Counsel

Artificial entities like Appellants are not permitted to appear before the Board without representation by a Delaware attorney.¹ The Delaware Supreme Court Rules define an “artificial entity” as:

any corporation incorporated in Delaware or any corporation doing business in Delaware pursuant to the provisions of 8 Del. C. § 371 or the exceptions thereto contained in 8 Del. C. § 373, any limited liability company defined under the provisions of 6 Del. C. § 18-101, any partnership or limited partnership as defined in 6 Del. C. § 15-101(11); any trust as defined in 12 Del. C. § 3501 et seq., any estate for which an executor or administrator can act pursuant to 12 Del. C. § 1501 et seq., or any other entity falling within 6 Del. C. Chapter 31, including persons, firms and unincorporated associations transacting business in Delaware that have or should have filed a certificate with the Prothonotary’s office designating a trade name.

For these reasons, Clean & Fresh – a corporation without counsel – could not proceed with its appeal.

DNREC conceded that Mr. Walls as the sole proprietor of Veterans Services could be allowed to argue on that entity’s behalf.

The Appeal Was Not Filed in a Timely Manner

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 Environmental Appeals

¹ *Transpolymer Indus., Inc. v. Chapel Main Corp.*, 582 A.2d 936 (Del. 1990) (“a corporation, being an artificial entity, can only act through its agents and, before a court only through an agent duly licensed to practice law.”); *Chang v. Children’s Advocacy Center of Delaware, Inc.*, 2016 WL 7188105, at*4 (Del. Super. Dec. 9, 2016) (quoting *Townsend v. Integrated Mfg. & Assembly*, 2013 WL 4521087, at *1 (Del. Super. July 30, 2013). *See also* 7 Del. Admin. Code §105-5.7 (“The appellant shall appear personally or be represented by counsel”).

Board within 20 days after receipt of the Secretary’s decision or publication of the decision.” The Board’s regulations remove any doubt, stating “any person whose interest is substantially affected by any action of the Secretary may appeal to the Environmental Appeals Board within (20) days after the Secretary has announced the decision.” 7 *Del. Admin. Code* §105-1.1.

The Appeal, although dated March 31, 224 (sic) (and purporting to be sent by electronic mail and delivered overnight) was not delivered to the Board until April 5, 2024 when it was hand delivered to the DNREC Office of the Secretary.

Most important to this decision, the Appeal states on page 1:

The Secretary's Order No: 2024-A-0010 was promulgated to the community on March 13, 2024. A copy of the Secretary's Order is attached to this Statement of Appeal.

The Board lacks jurisdiction to hear appeals brought after the expiration of that 20-day period. *Booth v. Garvin*, 2019 WL 462486, *3 (Del. Super. Feb. 6, 2019), *Eastern Shore Environmental, Inc. v. Delaware Solid Waste Authority*, 2004 WL 440413, *5 (Del. Super. Feb. 26, 2004; *see also Yeager v. Fisher*, 258 A.3d 833 (Table), 2021 WL 3578626, *1 (Del. 2021) (“Time is a jurisdictional element.”).

Veterans Services advanced arguments that the “clock” for the appeal should not have started until Veterans Services “personally” received a copy of the Secretary’s Order. Regarding this event, Mr. Walls offered various interpretations.

Adopting a rule of actual receipt, urged by Mr. Walls, would create untenable uncertainty in environmental permitting in the State. Deeper analysis into the arguments made by Veterans Services, however, is unnecessary. The Appeal itself refers to a March 13, 2024 promulgation date and attaches a copy of the Secretary's Order. Any argument for a different appeal due date is belied by the statement contained in the Appeal itself. By that statement, Appellants conceded that the Appeal was due by April 2, 2024 for the Board to hold jurisdiction over this purported appeal. Regardless of the date typed on the appeal letter, there is no contrary evidence that the Appeal was submitted in a timely manner.

Appellants Lack Standing for the Appeal

Standing is a threshold question to ensure the party is entitled to mount a legal challenge. *Dover Historical Soc. v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1110 (Del. 2003). The party invoking the jurisdiction of the Board has the burden to demonstrate standing. *Eastern Shore Environmental, Inc. v. Delaware Solid Waste Authority*, 2004 WL 440413, *3 (Del. Super. Feb. 26, 2004).

To determine whether a party has been “substantially affected” by the Secretary's Order to have standing to appeal, Delaware applies the 3-prong “*Data Processing*” test:

- 1) have Appellants suffered injury in fact;
- 2) can the injury be fairly traceable to the Secretary's Order; and

3) will the injury be redressed by a decision in favor of the Appellants, or is it merely speculative?

Food and Water Watch v. DNREC, 2018 WL 4062112, *3 (Del. Super. Aug. 24, 2018) (citing *Oceanport Indust., Inc. v. Wilm. Stevedores, Inc.*, 636 A.2d 892, 903 (Del. 1994) (adopting the test established by the U.S. Supreme Court in *Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970))).

In this case, the Secretary's Order permits Noramco, Inc. to install additional machinery and to add product lines. However, the Secretary's Order did not raise the total maximum amount of pollution allowed to be emitted by Noramco's facility. Even if Appellants could establish a traceable, injury-in-fact, the Board's reversal of the Secretary's Order would have no effect on the total amount of pollution permitted to be emitted by Noramco. As such, Appellants cannot satisfy their burden of demonstrating they have been "substantially affected" by the Secretary's Order.

CONCLUSION

Following the arguments by each of DNREC and Mr. Walls, on behalf of Veterans Services, the Board entered executive session as permitted by 7 Del. C. § 6008(a) to deliberate and receive legal advice. Upon conclusion of executive session, Board member Houghton, seconded by Board member Horsey, moved to grant the Motion to Dismiss. By a vote of 6 in favor, with 0 opposed, the Board determined to so act.

Upon consideration of Appellee’s Motion to Dismiss, the Board concludes that Appeal was untimely and even if timely, the Appellants’ lack standing to bring it because Appellants’ claimed injury is not capable of redress by the Board. As such, the Appeal must be dismissed.

IT IS SO ORDERED this 11th day of October, 2024.

/s/ Dean Holden (e-singed pursuant to 6 Del. C. §12A-107)
Dean Holden, Chairperson

The following 5 Board members concur in this Decision and Final Order:

Date: _____
_____ Randall Horne, Board Member

Date: Oct. 4, 2024
/s/ Guy Marcozzi (e-singed pursuant to 6 Del. C. §12A-107)
Guy Marcozzi, Board Member

Date: _____
_____ Michael Horsey, Board Member

Date: Oct. 11, 2024
/s/ Michael Houghton (e-singed pursuant to 6 Del. C. §12A-107)
Michael Houghton, Board Member

Date: Oct 4, 2024
/s/ Deborah D. Wicks (e-singed pursuant to 6 Del. C. §12A-107)
Deborah Wicks, Board Member

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IT IS SO ORDERED this ____ day of ____, 2024.

Dean Holden, Chairperson

The following 5 Board members concur in this Decision and Final Order:

Date: 10-8-24 *Randall T. Horne*
Randall Horne, Board Member

Date: _____ _____
Guy Marcozzi, Board Member

Date: _____ _____
Michael Horsey, Board Member

Date: _____ _____
Michael Houghton, Board Member

Date: _____ _____
Deborah Wicks, Board Member

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IT IS SO ORDERED this ____ day of ____, 2024.

Dean Holden, Chairperson

The following 5 Board members concur in this Decision and Final Order:

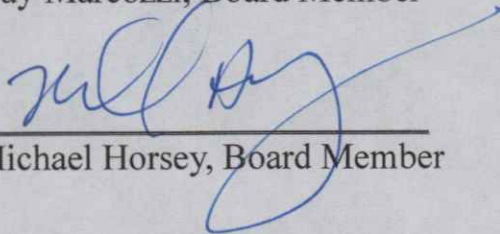
Date: _____

Randall Horne, Board Member

Date: _____

Guy Marcozzi, Board Member

Date: 10/11/24



Michael Horsey, Board Member

Date: _____

Michael Houghton, Board Member

Date: _____

Deborah Wicks, Board Member