

**BEFORE THE ENVIRONMENTAL APPEALS BOARD**

**DELMARSH, LLC,** )  
 )  
 **Appellant,** )  
 )  
 **v.** )  
 )  
 **DELAWARE DEPARTMENT OF** )  
 **NATURAL RESOURCES AND** )  
 **ENVIRONMENTAL CONTROL,** )  
 )  
 **Appellee.** )

**EAB Appeal No. 2020-03**

**DELAWARE DEPARTMENT OF NATURAL RESOURCES AND  
ENVIRONMENTAL CONTROL’S RESPONSE TO  
APPELLANT’S MOTION IN LIMINE**

Defendant Delaware Department of Natural Resources and Environmental Control (“DNREC”) responds to Appellant’s Motion *in Limine* as follows:

1. Appellant first argues the 1926 aerial photograph (“photograph”) should be excluded. As indicated in Appellant’s Motion, DNREC initially provided the photograph by providing the URL: [http://firstmap.gis.delaware.gov/arcgis/rest/services/DE\\_Imagery/DE\\_Imagery\\_1926/ImageServer](http://firstmap.gis.delaware.gov/arcgis/rest/services/DE_Imagery/DE_Imagery_1926/ImageServer). See Exhibit A attached. Upon Appellant’s insistence, DNREC provided a screenshot of the provided data in the ArcGIS software, however DNREC intends to introduce this exhibit through the initially-provided website to eliminate any concern of reliability.

2. Appellant alleges there is no verification as to the year of the photograph's preparation or of who prepared the photograph. This information is also publicly accessible. *See* Exhibit B attached.

3. Appellant argues the photograph should not be admitted into evidence as it is unauthenticated and unauthenticatable. Delaware Rule of Evidence ("DRE") 902(5) provides a "publication purporting to be issued by a public authority" is self-authenticating. Courts regularly hold that a webpage maintained on a government website is a publication purporting to be issued by public authority under Rule 902(5). *I.e. Williams v. Long*, 585 F. Supp. 2d 679 (D. Md. 2008). Accordingly, the photograph is self-authenticating.

4. Appellant next argues the photograph is inadmissible based upon its lack of relevance because it is unduly prejudicial due to its lack of reliability. As previously discussed, the photograph is self-authenticating and will be introduced as ArcGIS data for further reliability and accuracy. Under DRE 403, evidence may only be excluded if the probative value is substantially outweighed by the danger of unfair prejudice. Excluding evidence under Rule 403 "has been held to be an 'extraordinary measure' that should be 'used sparingly.'" *Paikin v. Vigilant Ins. Co.*, 2013 WL 5488454 (Del. Super. 2013) *citing United States v. Meester*, 762 F.2d 867, 875 (11th Cir.1985), cert. denied, 474 U.S. 1024 (1985). The probative value of the photograph as evidence of the historical topology of the property in question is irrefutable, and as

one of the factors in the statutory definition of wetlands, it is of central relevance to this case. Further, the risk of unfair prejudice is minimal before a Board with technical experience.

5. While not outright stating so, Appellant's argument about reliability sounds of a hearsay objection. The photograph and its contents are admissible pursuant to DRE 803(16), which provides statements within a document that is at least 20 years old are admissible once the document is authenticated. Accordingly, there is no legitimate argument against the reliability of the photograph.

6. Appellants further argue an expert witness is required to interpret the photograph. There is no blanket requirement in Delaware Courts for aerial photography to be interpreted by an expert. *I.e. Miller v. Steele*, 2002 WL 31716366, (Del. Ch. 2002). To the extent DNREC's witnesses may offer testimony based on scientific, technical, or other specialized knowledge within the scope of DRE 702, they are qualified by virtue of their education and experience to review aerial photographs for wetlands mapping purposes. Further, pursuant to DRE 701, lay witnesses may offer opinion testimony rationally based on their perception. Accordingly, DNREC's witnesses can, at a minimum, testify as to their observations from reviewing the photograph as part of their decision-making process.

7. Appellants last argue the On-Site Investigation Summary and January 30, 2020 Decision, which forms the basis for this appeal, are inadmissible because

they rely on the photograph. As an initial point, Appellant provides no authority for such an extreme position. On the contrary, evidence may be admitted for one purpose while inadmissible for another. Further, while the opinions contained within these documents may be founded in part on the photograph, nothing about the relevancy or reliability of these documents is based on the photograph. Accordingly, even if the Board were to exclude the photograph, these documents and the opinions stated within them would not be wholly inadmissible.

WHEREFORE, DNREC respectfully requests that the Board deny Appellant's Motion *in Limine*.

**STATE OF DELAWARE  
DEPARTMENT OF JUSTICE**

*/s/ Kayli H. Spialter* \_\_\_\_\_  
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