

BEFORE THE ENVIRONMENTAL APPEALS BOARD

FOR THE STATE OF DELAWARE

TOWN OF GEORGETOWN,)	
)	
Appellant,)	Appeal No. 98-09
)	
v)	
)	
SECRETARY OF DEPARTMENT OF)	
NATURAL RESOURCES & ENVIRONMENTAL)	
CONTROL, STATE OF DELAWARE,)	
)	
Agency-below,)	
Appellee.)	

FINAL ORDER AND DECISION

James A. Fuqua, Jr., Esq., 28 The Circle, P.O. Box 250 Georgetown, Delaware 19947, Attorney for Appellant Town of Georgetown.

Kevin P. Maloney, DAG, Department of Justice, State of Delaware, 820 N. French St., 6th Flr., Wilmington, Delaware 19801 Attorney for the Secretary.

Before Chairman Clifton H. Hubbard, Jr., Joan Donoho, Robert S. Ehrlich, and Robert I. Samuel, comprising a quorum of the Environmental Appeals Board. Joelle P. Hitch, Deputy Attorney General for the Environmental Appeals Board.

The Environmental Appeals Board (hereinafter the "Board") scheduled a hearing on the above captioned appeal for April 13, 1999. The Appellee, Department of Natural Resources and Environmental Control, (hereinafter "DNREC") filed a Motion to Dismiss/Stay the Appeal which the Town of Georgetown (hereinafter "Georgetown") opposed. Both parties were given the opportunity to brief the Motion to Dismiss/Stay for the Board. The hearing was rescheduled to April 27, 1999, to address the Motion in this matter and for the Board to consider a similar motion filed in EAB Appeal number 98-10 regarding the City of Rehoboth Beach. The Board met on April 27, 1999, to consider the motions and responses without oral argument from the parties. The following is the Order of the Environmental Appeals Board.

STATEMENT OF THE CASE

On December 18, 1998, the Town of Georgetown, by and through James A. Fuqua, Jr., filed this appeal with the Environmental Appeals Board appealing the Secretary's Order No. 98-W-0044 regarding Total Maximum Daily Loads (TMDLs) for Indian River, Indian River Bay and Rehoboth Bay, Delaware. The Town of Georgetown has appealed challenging the Regulation and specifically the requirement that "all point sources which are currently discharging into the Indian River, Indian River Bay and Rehoboth Bay and their tributaries shall be eliminated systematically". (TMDL Regulation Article 1). Georgetown asserts it is substantially affected by the TMDL Regulation and is authorized pursuant to 7 *Del. C.* § 6008 to file this appeal.

DNREC has filed a Motion to Dismiss/Stay the appeal arguing 1) the Board lacks jurisdiction over an appeal of DNREC's regulations, 2) the Board should defer to the Superior Court for its ruling on the issue of jurisdiction since an identical appeal filed by Georgetown is pending before

the Superior Court, 3) the Town of Georgetown lacks standing to bring the appeal and 4) the appeal is not ripe for adjudication.

SUMMARY OF FACTS AND ARGUMENTS

Arguments were presented through the motion and the filing of briefs by each party. The Board did not request oral argument. DNREC argues 7 *Del.C.* § 6008(c) was impliedly repealed through the revision of 29 *Del.C.* § 10161(b) of the Administrative Procedures Act (APA). The APA provides for judicial review of regulations and thus, DNREC argues it is in conflict with section 6008(c). DNREC asserts that as a result of this conflict the APA must prevail citing *Green v. County Council of Sussex County*, Del. Ch. 415 A.2d 481 (1980) and *State Department of Labor v. Minner*, Del. Supr., 448 A.2d 227 (1982).

DNREC further asserts that the Board should stay any consideration of the appeal since the Appellants filed an identical action in Superior Court for a declaratory judgment as to the proper forum for this appeal.

Assuming the Board accepts jurisdiction, DNREC further argues the Town of Georgetown has not been substantially affected under *Oceanport Ind. v. Wilmington Stevedores*, Del. Supr., 636 A.2d 892 (1994) and *Assoc. Of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150 (1970) since Georgetown has not suffered an "injury in fact". DNREC asserts Georgetown cannot allege an injury which is "concrete" or "particularized" or "actual" or "imminent" as required by *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). DNREC argues Georgetown's rights can be adequately protected through appeal should they object to the NPDES permit. DNREC argues the Town of Georgetown has no means by which to measure any injury suffered until the NPDES permit is issued

DNREC lastly, argues the issue is not ripe for adjudication because the NPDES permit

has not yet been issued and Georgetown may not disagree with the terms of the permit. DNREC asserts the TMDL is simply a principle to be applied and that it does not bind DNREC to a particular method or timetable to eliminate Georgetown's point source.

The Town of Georgetown argues there is no "irreconcilable conflict" between the APA and 7 *Del.C.* § 6008 therefore, the Board has jurisdiction. In support for this position, Georgetown likewise cites *Green v. County Council of Sussex County*, Del.Ch., 415 A.2d 481 (1980). Georgetown further argues that the provision in 7 *Del.C.* § 6008 is the more specific provision and "[i]t is assumed that when the General Assembly enacts a latter statute in an area covered by a prior statute, it has in mind the prior statute and therefore, statutes on the same subject must be construed together so that effect is given to every provision unless there is an irreconcilable conflict." *Green* at 484. As previously argued, Georgetown asserts there is no "irreconcilable conflict" and as such Board maintains jurisdiction.

The Town of Georgetown argues its only motive for filing contemporaneous appeals before this Board and the Superior Court was its knowledge that DNREC would raise a jurisdictional issue. Georgetown asserts it will dismiss its appeal before the Superior Court should the Board accept jurisdiction.

The Town of Georgetown argues it has standing to pursue this appeal because it is a "point source" discharger and has an interest in regulations regarding such. Georgetown argues it meets the test in *Gannett Co., Inc. v. State*, Del. Supr. 565 A.2d 895, 897 (1989), in that it can claim an injury-in-fact and the interest sought to be protected is within the zone of interest to be protected or regulated by the statute. Georgetown cites both a monetary interest in the regulations and an interest in protecting the public welfare through the provision of this service.

Lastly, Georgetown asserts the issue is "ripe" for adjudication as it is an appeal of a regulation. Such an appeal becomes "ripe" upon the adoption of the regulation by the Secretary as 7 *Del.C.* § 6008 requires an appeal must be filed within 20 days of its adoption.

CONCLUSIONS OF LAW

1. The Board concludes it has jurisdiction to hear this appeal pursuant to 7 *Del.C.* § 6008. Section 6008 (a) states "[a]ny 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".(Emphasis added) The language in section 6008 (a) clearly establishes that a party has the option to file an appeal before the Board. The statute does not mandate an appeal be heard before the Board. Similarly, 29 *Del. C.* § 10141 of the APA states "[a]ny person aggrieved by and claiming the unlawfulness of any regulation may bring an action in the Court for declaratory relief." (Emphasis added) In *Green v. County Council of Sussex County*, Del. Ch., 415 A.2d 481 (1980), the two statutes did not directly conflict, however required additional formalities and advertising in order to meet the requirements of both statutes. In *State Department of Labor v. Minner*, Del. Supr., 448 A.2d 227 (1982), there was an "irreconcilable conflict" between the two statutes regarding the time for filing the appeal and who is entitled to file such an appeal. The Court held, "to the extent the two statutes at issue conflict, [the APA] supersedes § 3344; otherwise they will be construed together." *Minner* at 229.

In reading the two statutes together, the Board concludes that a substantially affected party may appeal either to the Board or to Superior Court. The Board does not believe this is an "irreconcilable conflict" under *Green*. The Board asserts the doctrine of primary jurisdiction can be exercised by the Superior Court in those matters appealed to the Court in the first instance which

may require further administrative review.

The doctrine of primary jurisdiction "comes into play when a claim is originally cognizable in a court of law or equity but referral to an agency competent to rule preliminarily on issues which fall within its regulatory powers is authorized. In such situations, proceedings before a court are merely suspended pending referral of appropriate issues to such an administrative body." *Webb v. Diamond State Telephone Company*, Del. Ch., 237 A.2d 143, 145 (1967). Through this doctrine, the Court may refer matters back to the Board for review prior to a hearing before the Court.

In addition to this doctrine, the parties have a right to appeal the Board's decision to the Superior Court pursuant to 7 *Del.C.* § 6009. The purpose of the APA to "standardize the procedures and methods whereby certain state agencies exercise their statutory powers . . ." is maintained through this further appeal process to the Court. This appeal process is consistent with the *Minner* decision supporting the goal of replacing previous non-uniform regulation with a uniform statewide system

2. The Town of Georgetown has an identical appeal presently pending in the superior Court. The Town of Georgetown has represented that it will dismiss its pending appeal in the Superior Court should the Board accept jurisdiction of the appeal before it. The Board accepts jurisdiction, however, the fact presently before the Board is that the identical action with the identical issues is presently pending before the Superior Court. This Board will not entertain this appeal while an identical appeal is pending before the Court. In the interest of judicial economy and based on the authority of the Superior Court over the decisions of the Board, the Board has decided to Stay the appeal until the Superior Court appeal is resolved.

3. The Board concludes the Town of Georgetown has standing to bring this appeal. In

Oceanport Ind. v. Wilmington Stevedores, Del. Supr., 636 A.2d 892 (1994), the Supreme Court adopted the test in *Assoc. Of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150 (1970). The decision in *Oceanport* sets out the test for "substantially affected". Georgetown must first show "an injury in fact, which is the invasion of a legally protected interest within the zone of interest sought to be protected or regulated by the statute." The invasion as defined by *Oceanport* must be "1) concrete and particularized, and b) (sic) actual or imminent, not conjectural or hypothetical". *Oceanport* Del. Supr. 636 A.2d 892, 903 (1984) *citing* 112 S. Ct. at 2136.

Georgetown must also show an "actual connection between the injury and the conduct complained of -- the injury has to be 'fairly . . . trace [able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Oceanport* at 903. The third part of the test requires that "it must be likely that the injury will be redressed by a favorable decision, rather than merely speculative". *Id.* at 903.

Georgetown has asserted, and DNREC has not denied, that they are one of eleven identified "point source" dischargers in the state. The adoption of the TMDL, although not presently requiring Georgetown to take any action, does "set a limit on the amount of specific pollutants that can be discharged into a water body and still protect water quality". (DNREC Op. Br. p. ii) Although the permit requirements are not yet "concrete and particularized" the terms of the TMDL regulation are and the issuance of a permit under this regulation will be "actual and imminent".

The Board has determined that through the adoption of the regulation there is an actual connection between the injury and the conduct complained of and the injury is fairly traceable to the challenged action. As such, the Board has determined the Town of Georgetown is substantially affected by the adoption of the Secretary's Order No. 98-W-0044 regarding Total Maximum Daily

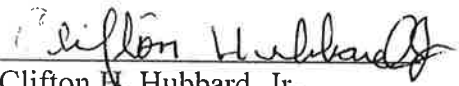
Loads (TMDLs) for Indian River, Indian River Bay and Rehoboth Bay, Delaware.

4. The Board agrees with the Town of Georgetown that the appeal was "ripe" upon its adoption by the Secretary. Under 7 *Del.C.* § 6008, an appeal must be filed within 20 days of its adoption.

WHEREFORE, the Board hereby GRANTS the Motion to Stay filed by DNREC since the identical appeal and issues are presently pending before the Superior Court. The appeal of the Town of Georgetown EAB No. 98-09 shall be Stayed pending resolution of the appeal presently pending in Superior Court on the identical issues.

IT IS SO ORDERED.

The following Board members concur with the decision in its entirety.


Clifton H. Hubbard, Jr.
Chairman


Date

Environmental Appeals Board
Appeal No. 98-09

Joan Donoho
Joan Donoho,
EAB Board Member

5/17/99
Date

Environmental Appeals Board
Appeal No. 98-09

A handwritten signature in black ink, appearing to read "Robert Samuel", written over a horizontal line.

Robert I. Samuel
EAB Board Member

05/03/1999
Date

Environmental Appeals Board
Appeal No. 98-09

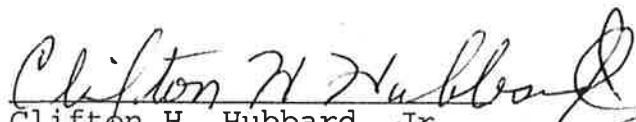
The following Board members concur with the decision regarding arguments 1, 3, & 4, however dissent regarding argument 2.

Robert S. Ehrlich
Robert S. Ehrlich
EAB Board Member

4/30/99
Date

CONCLUSION

The Board determines that this proceeding be remanded to the Secretary for reconsideration.


Clifton H. Hubbard, Jr.
Chairman

11/16/94

Robert S. Ehrlich

Robert I. Samuel

Diana A. Jones

Charles Morris


Joan Donoho

DATED: November 14, 1994

CONCLUSION

The Board determines that this proceeding be remanded to the Secretary for reconsideration.

Clifton H. Hubbard, Jr.
Chairman


Robert I. Samuel

Robert S. Ehrlich

Diana A. Jones

Charles Morris

Joan Donoho

DATED: November 15, 1994



CONCLUSION

The Board determines that this proceeding be remanded to the Secretary for reconsideration.

Clifton H. Hubbard, Jr.
Chairman

Robert S. Ehrlich

Robert I. Samuel

Diana A. Jones

Diana A. Jones

Charles Morris

Joan Donoho

DATED: November ____, 1994

11-21-94

CONCLUSION

The Board determines that this proceeding be remanded to the Secretary for reconsideration.

Clifton H. Hubbard, Jr.
Chairman

Robert S. Ehrlich

Robert I. Samuel

Diana A. Jones

Charles Morris



Joan Donoho

DATED: November 21, 1994