

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

<b>FOOD &amp; WATER WATCH,</b>	)	
	)	
<b>Appellant,</b>	)	
	)	
<b>v.</b>	)	<b>EAB Appeal No. 2016-06</b>
	)	
<b>DELAWARE DEPARTMENT</b>	)	
<b>OF NATURAL RESOURCES AND</b>	)	
<b>ENVIRONMENTAL CONTROL,</b>	)	
	)	
<b>Appellees.</b>	)	

**DECISION AND FINAL 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 December 6, 2016, in the Auditorium of the Richardson & Robbins Building, located at 89 Kings Highway, Dover, Kent County, Delaware.

Members of the Board present and constituting a quorum were: Nancy Shevock (Chair), Gordon Wood, Michael Horsey, Dean Holden, Robert Mulrooney, Sebastian LaRocca, and Guy Marcozzi. No Board Members disqualified themselves or were otherwise disqualified. Deputy Attorneys General Frank N. Broujos and Julie M. Donoghue represented the Board.

Kenneth T. Kristl, Esquire of the Environmental & Natural Resources Law Clinic, Widener University Delaware Law School, and Tarah Henzen, Esquire, Staff Attorney for Food & Water Watch, represented Appellant Food & Water Watch (“F&WW”). In accordance with Delaware Supreme Court Rule 72, Ms. Henzen was admitted *pro hac vice*

to represent F&WW and appear before the Board in this matter. Deputy Attorney General William Kassab represented Appellees Delaware Department of Natural Resources and Environmental Control (“DNREC”) and DNREC Secretary David Small (“Secretary”).<sup>1</sup>

### **STATEMENT OF THE CASE AND PROCEEDINGS**

Following publication in the Delaware Register of Regulations, on November 11, 2011, DNREC and the Delaware Department of Agriculture (“DDA”) adopted regulations that established a new general “National Pollutant Discharge Elimination System” (“NPDES”) permitting program for Concentrated Animal Feeding Operations (“CAFOs”) with no land application of manure. Because the NPDES program is subject to federal overview, the Environmental Protection Agency approved the regulation, effective the same day. Rather than requiring each CAFO to apply for an individual NPDES permit, the regulations established a general NPDES permit program that allows a CAFO to obtain NPDES permit coverage by submitting a “Notice of Intent” and a Nutrient Management Plan (“NMP”) to DNREC and DDA.<sup>2</sup> Thus, after DNREC and DDA reviewed an applicant’s submitted Notice of Intent and NMP and after the public comment period expires, a CAFO can be granted or denied NPDES permit coverage under the General Permit.

Later, on October 28, 2015, DNREC and DDA published public notice of a draft NPDES general permit, specifically Permit No. DE-5000N/11 (the “General Permit”). This General Permit is the focus of this appeal. The General Permit was intended be

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<sup>1</sup> For the purposes of this Decision and Order, Appellees Secretary and DNREC are collectively referred to as “DNREC” or “Appellee.”

<sup>2</sup> See 7 *Del. Admin. C.* § 7201-9.5.

available to eligible Large, Medium, and Designated Poultry CAFOs<sup>3</sup> that do not apply manure to the land.

After giving the legally-required public notice, on December 3, 2015, DNREC Hearing Officer Robert Haynes (the “Hearing Officer”) conducted a public hearing to review the General Permit and to solicit and consider public comments on it. The Hearing Officer subsequently prepared and submitted a report (the “Hearing Officer’s Report”) to the Secretary on February 24, 2016. The Hearing Officer’s Report set forth the background and procedural history of the General Permit, a legal analysis of the evidence presented, supporting reasoning for each of the findings he made, and his recommended findings and conclusions regarding the General Permit.<sup>4</sup>

Thereafter, the Secretary and the Secretary of DDA jointly issued Secretary's Order No. 2016-W-0008 (the “Order”) on March 30, 2016 (with an effective date of March 30, 2016).<sup>5</sup> The Order incorporated the Hearing Officer’s Report, accepted the Hearing Officer’s findings and recommendations, and approved the General Permit.

On April 6, 2016, DNREC issued public notice for the Order, the final version of the General Permit, and the “Fact Sheet” for the General Permit.

On April 25, 2016, pursuant to 7 *Del. C.* § 6008(a), F&WW timely filed with the Board a statement of appeal of the Order. In its Statement of Appeal, F&WW argued that

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<sup>3</sup> These terms are defined at 7 *Del. Admin. C.* § 7102-9.5.3.

<sup>4</sup> The Order refers to the General Permit as the “Revised General Permit.” For purposes of this Final Decision and Order, however, the term “General Permit” is used exclusively for consistency.

<sup>5</sup> F&WW and DNREC stated in their joint stipulation of facts that the Order had an effective date of April 1, 2016, but the Order, which was attached to the appeal, states that its effective date was March 30, 2016. This date discrepancy, however, is not pertinent to this Decision and Final Order.

the Secretary acted arbitrarily, capriciously, and contrary to law in issuing the Order because the General Permit violates the federal Clean Water Act, 33 U.S.C. § 1251 et seq. ("CWA"), the CWA's regulations, and Section 7201-1.3 of the Delaware CAFO Regulations<sup>6</sup> by failing to include surface water discharge compliance monitoring mechanisms. F&WW also argued that the Order was improperly issued because DNREC failed to regulate discharges of pollutants, including litter, dusts, and ammonia from ventilated poultry confinement house as required by the CWA and Section 7201-9.5.6.4.1.1 of the Delaware CAFO Regulations. Finally, F&WW argued that it qualified as a person whose interest is substantially affected by an action of the Secretary, and hence it was entitled to bring this appeal under 7 *Del. C.* § 6008(a) (the "Appeal").

Later, on August 22, 2016, F&WW filed a Motion for Summary Judgment and a supporting brief in which it argued that, as a matter of law, F&WW was entitled to summary judgment in its favor. F&WW's Motion focused solely on the legal issue of whether the General Permit was legally deficient because it does not require surface water monitoring.

On October 18, 2016, DNREC timely filed with the Board its reply brief as well as a cross Motion for Summary Judgment. DNREC argued in its brief that the Board should dismiss this appeal because F&WW lacked standing under the statutory requirements of 7 *Del. C.* § 6008(a)<sup>7</sup> and under applicable case law.

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<sup>6</sup> See 7 *Del. Admin. C.* § 7201 et seq.

<sup>7</sup> 7 *Del. C.* § 6008(a) provides, in pertinent part, that "[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."

On November 10, 2016, F&WW filed with the Board a reply brief in response to DNREC's Motion for Summary Judgment. As part of its response, F&WW attached to its reply brief declarations from three of its members as support for its argument that F&WW had standing to pursue this appeal.<sup>8</sup>

### **THE CHRONOLOGY**

Prior to the hearing and in accordance the Board's Regulations,<sup>9</sup> the Board received DNREC's Chronology, which consisted of the following:

- The Secretary's Order which promulgated the draft General Permit (dated October 15, 2011);
- A draft of the General Permit (dated April 29, 2015);
- A CAFO outreach letter (dated September 28, 2015);
- The legal notice of the General Permit (dated October 28, 2015);
- Mid-Atlantic Environmental Law Center's comments (dated November 24, 2015) and Chesapeake Bay Foundation's comments (dated November 27, 2015);
- A Technical Response Memorandum (dated January 26, 2016);
- The Hearing Officer's Report (dated February 5, 2016);
- A copy of the Order (dated March 30, 2016);

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<sup>8</sup> See Declarations of Ms. Patty Lovera, Ms. Kathy Phillips, and Ms. Maria Payan, Appendix of Appellant's Memorandum in Support of its Motion for Summary Judgment, Tab 1.

<sup>9</sup> 7 *Del. Admin. C.* §105-4.3 states that "[t]he Chronology . . . will be provided to the Board members prior to the hearing."

- A copy of the General Permit for Large and Medium CAFO's with no land application effective (dated April 1, 2016);
- Legal notice of the Order (dated April 22, 2016);
- F&WW's Statement of Appeal (dated April 22, 2016); and
- The receipt letter from the Board that acknowledged the filing of the Appeal (dated April 25, 2016).

### **THE MOTIONS FOR SUMMARY JUDGMENT**

By agreement of the parties, the Board first considered the threshold issue of whether F&WW had standing to bring this appeal, as raised by DNREC in its Motion for Summary Judgment. The Board thus considered evidence and heard oral argument from the parties on this issue.

#### **A. The Evidence Regarding Standing**

Prior to the hearing DNREC and F&WW filed with the Board a joint stipulation of facts in which DNREC stipulated that for purposes of the Board's consideration of the Motions for Summary Judgment, it did not dispute the facts alleged in the declarations of the three F&WW members, Ms. Maria Payan ("Payan"), Ms. Kathryn Phillips ("Phillips") and Ms. Patty Lovera ("Lovera") (collectively, the "Declarations"). The following are summaries of the Declarations:

##### **a. The Payan Declaration**

Payan stated in her declaration that she resides in Selbyville, Delaware, and that she has been a member of F&WW for about two years. Payan also works as a consultant with the Socially Responsible Agricultural Project and is responsible for working with rural

communities directly impacted by water and air pollution from CAFOs. She also provides training and information to citizens on water quality monitoring to detect CAFO pollution. She further stated in her declaration that she is aware that nitrogen, phosphorus, and pathogen pollution have impaired water quality in many of Delaware's rivers and streams. She stated that she regularly sees signs in various Delaware locations that warn swimming or fishing in local waterways is not safe. She also is aware that the Chesapeake Bay is impaired by nutrient pollution and is now subject to a Bay-wide cleanup plan for nutrient and sediment pollution. Additionally, she believes that CAFOs are contributing nitrogen, phosphorus, and pathogen pollution to waterways throughout Delaware.

Payan further stated that she has personally observed ditches leading directly off broiler CAFO facilities and has noticed that such ditches leading to or from CAFOs frequently smell like animal waste and contain visible algae. Based on her observations, she stated that Delaware broiler CAFOs typically seem to have ditches running out from their facilities, although it is not always possible to see these aspects of CAFOs from the public road. Payan also stated she plans to imminently begin conducting her own water quality monitoring near a particular Delaware broiler chicken CAFO and to collect water quality data related to this CAFO because she is concerned that the facility lacks adequate manure storage facilities and other means to prevent runoff. She is also concerned that this will lead to pollution discharges and degrade downstream waterways. She believes this monitoring is necessary to demonstrate that Delaware must impose stronger requirements on this facility to protect water quality.

Payan further stated that designing and implementing a surface water monitoring plan would require a significant personal investment of time and financial resources on her

part. This investment would include purchasing test strips, driving more than an hour each way to conduct the monitoring, and collecting samples of water to send to a certified lab. She also stated it would take her several hours to identify monitoring locations and that she would need to adjust her schedule to accommodate numerous long trips to conduct the representative monitoring over several months. In addition, she alleges that having access to information about CAFO pollution and whether Delaware CAFOs meet the General Permit's requirements is vital to her work to help protect rural communities and restore local waterways. Payan alleges that because DNREC refuses to require broiler CAFOs to monitor their own discharges for common poultry litter pollutants, she must spend her own time and resources conducting additional water quality monitoring and training citizens to conduct water quality monitoring to protect their own health and safety. She concludes that if the State of Delaware required CAFOs to conduct their own representative surface water monitoring, she would not feel the need to spend her time and money to document whether a particular facility is in compliance with anti-pollution laws and regulations.

Payan also alleged that her concerns about CAFO pollution in Delaware have negatively impacted her recreational activities in several ways. She stated that both Bethany State Park and Prime Hook State Park are located near her home. Until recently she regularly swam in the ocean, crabbed off the docks, fished, and ate the crabs and fish that she caught. Because she knows of CAFO water pollution and its threats to public health, she no longer swims in Delaware beaches or eats locally-caught fish or crabs and has not visited the beach in 2016 because she fears the polluted water makes visiting the beach unenjoyable to her. For example, on Memorial Day 2016, she did not visit Prime Hook State Park as she had planned to do because the State closed the park's beaches due



to *Enterococcus* bacteria, which, according to Payan, is a pathogen associated with livestock and human waste. Moreover, she alleged the lack of monitoring information (a) makes her feel that she needs to avoid swimming and doing other recreational activities that involve direct contact with waterways, (b) prevents her from fishing and crabbing like she used to do, and (c) has made recreation near Delaware beaches, rivers, and streams less enjoyable because she knows about agricultural pollution's degradation of these resources. She also alleges that DNREC's actions limit her own and other Delaware residents' access to information about the safety of the public waterways. For these reasons, she believes DNREC's actions heighten her fears and concerns and decrease her enjoyment of her local waterways.

Payan also stated that her awareness of and concerns about pollution from broiler CAFOs also make it much less enjoyable for her when she recreates near rivers and streams throughout the state. For example, she frequently visits friends who live on the Indian River. She is concerned that the numerous CAFOs in the area have degraded the waterway and made it unsafe for boating or swimming. This concern has consequently severely diminished her enjoyment of these visits and made her unwilling to swim or walk in the water or eat fish caught in it.

#### **b. The Phillips Declaration**

Phillips stated in her declaration that she lives in Ocean City, Maryland, and has been the Executive Director and Assateague Coastkeeper for the Assateague Coastal Trust since 2007. As Coastkeeper, Phillips patrols the bays, rivers, and streams in the region to

monitor water quality and investigate sources of pollution. She also sometimes monitors water quality and investigate sources of pollution in the Delaware Inland Bays. She also recreates on the Pocomoke River and in the adjacent parks, the Atlantic Coastal Bays, Indian River, and elsewhere in the Chesapeake and Delmarva coastal watersheds. These activities include swimming, boating, kayaking, canoeing, bird-watching and hiking. She also regularly swims and kayaks in the Atlantic Coastal Bays and from time to time paddles on the Pocomoke River. In addition, she sometimes swims in the ocean adjacent to the Indian River Inlet and paddles her kayak on Little Assawoman Bay in Delaware.

Phillips believes that CAFOs are a significant source of nutrient and pathogen loads to waterways on Delmarva, including the Pocomoke River, in part because they are not being regulated enough and citizens are not being provided with the information necessary to protect their waterways and communities. She is also concerned that the construction of more CAFOs in Delaware will increase the threat of CAFO pollution to local waterways, as well as the Atlantic Coastal Bays that are fed in part by Delaware tributaries.

Phillips also stated that she knows and is aware of the various types of pollution in the waterways, including fecal coliform and nutrient pollution from poultry CAFOs. She stated that such knowledge makes it much less enjoyable for her when she paddles or patrols as Coastkeeper or when she recreates on rivers like the Pocomoke and elsewhere in the Coastal Bays watershed. Finally, she worries about the environmental damage caused by these pollutants and the decline in the health of the rivers and streams in the region and she worries about her health and the health of others.

**c. The Lovera Declaration**

Lovera stated in her declaration that she has been the Assistant Director of F&WW since 2005 and stated that she has a business address in Washington, D.C. She explained that part of F&WW's work is to provide citizens with access to information about CAFO industry pollution. Lovera also stated that many of the F&WW members are concerned about using waterways that may be impacted by unmeasured CAFO pollution. Without water pollution monitoring of every permitted CAFO, Lovera maintains that F&WW cannot effectively communicate with its members and the public about Delaware's waterways or advocate for stronger policies and water quality protections at the state and local levels.

Lovera contended that a lack of monitoring data will also negatively impact the members' aesthetic and recreational interests in using their local waterways. Lovera stated that increased levels of nitrogen and phosphorous from fertilizer and animal waste pollutes water, which in turn leads to algal blooms. According to Lovera, algal blooms can de-oxygenate an area of water and result in deaths of aquatic life in areas of the Chesapeake Bay. This in turn leads to unusable waterways for fishing, swimming, recreation, or safe water consumption. Lovera also stated that many of F&WW's members rely on such waterways for recreation and drinking water.

**B. DNREC's Argument Against Standing**

Citing 7 *Del. C.* § 6008(a) and case law, DNREC contended that F&WW lacks standing to bring its Appeal because it is not a person “substantially affected” by the issuance of the Secretary’s Order and the General Permit authorized thereunder.<sup>10</sup>

DNREC argued that F&WW failed to establish its standing to challenge the Order because the Declarations failed to show that its members’ interests had been “substantially affected” by the Secretary’s decision not to include surface water monitoring as a standard condition in the General Permit.

DNREC argued that based on the Delaware Supreme Court’s holding in *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*,<sup>11</sup> speculative environmental injuries (such as F&WW’s) are insufficient to establish that a person’s interest has been substantially affected under 7 *Del. C.* § 6008(a). As the Delaware Supreme Court explained in *Oceanport*, to achieve standing a person’s interest in a controversy must be distinguishable from the interest shared by other members of a class or the public in general.<sup>12</sup>

According to DNREC, F&WW also cannot demonstrate that it has suffered a legally required “injury-in-fact.” DNREC argued that none of the members of F&WW pointed to a specific environmental injury caused by the Order. The members of F&WW stated in the Declarations that they were harmed by pollution from CAFOs, they no longer recreated in Delaware waterways, and they no longer consumed seafood or went to the

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<sup>10</sup> As part of its argument on this issue, DNREC presented to the Board a PowerPoint presentation that summarized DNREC’s arguments and the applicable case law. At the request of DNREC (and without objection by F&WW), the Board admitted into evidence DNREC’s PowerPoint presentation as DNREC Exhibit A.

<sup>11</sup> See 636 A.2d 892 (Del. 1994).

<sup>12</sup> See *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991).

beach. One member also alleged that she had to perform their own surface water testing to determine whether CAFOs were polluting. DNREC maintained none of these allegations of injuries were sufficient to establish that the members of F&WW had an “injury-in-fact.” At most, F&WW and its members had a sincere interest in the environmental problem of nutrient pollution in Delaware's waterways. Nevertheless, according to DNREC, a sincere interest in an environmental problem is insufficient to confer standing under 7 Del. C. § 6008 and *Oceanport*.

DNREC also argued that F&WW had failed to show that its interest was distinguishable from the interests shared by the public in general. Even if the members of F&WW had modified how they used the public waterways, this fact did not establish that they had an interest distinguishable from the general public's interest in using the waterways. F&WW's increased sensitivity did not establish that their interests in protecting Delaware waters from pollution was distinguishable from the public's interest. Additionally, if the members of F&WW performed their own water testing, such actions did not establish that they had an interest that was unique from other Delaware citizens. Again, a greater interest taken by the members of F&WW in the waterways did not establish that their interest was unique or distinguishable from the general public's interest.

DNREC also argued that based on this Board's holding in *William F. Zak v. Acting Secretary David Small et al.*,<sup>13</sup> F&WW and its members have failed to present any evidence that they have suffered (or likely would suffer) any concrete, particularized injury from the Order. In *Zak*, the appellant alleged that his recreational use of the Inland Bays would be

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<sup>13</sup> EAB Appeal No. 2008-08.

diminished by the Secretary's permitting decision. There, the Board found that the appellant had not presented any evidence that he had suffered any concrete, particularized injury with respect to his recreational use of the Inland Bay based on the Secretary's decision and found that any injury was purely speculative. The Board also concluded that the appellant was advocating for the public at large and that he had no factual basis to demonstrate he had a unique personal stake in the matter, had injuries that were concrete and particularized, or that his injuries were more than mere concerns for environmental problems affecting the public at large.

According to DNREC, F&WW's contentions are similarly indistinguishable from those that could be raised by the general public. DNREC argued that F&WW was advocating about an environmental problem merely for the benefit of Delaware citizens in general, which advocacy would fail to qualify as a concrete, particularized injury to F&WW. F&WW failed to provide any factual basis to demonstrate that it had a unique personal stake in the matter, that its injuries were concrete and particularized, and that its injuries were more than mere concerns regarding environmental problems affecting the public at large. Because F&WW failed to show standing to bring the Appeal, DNREC argued that its Motion for Summary Judgment on the issue of standing should be granted.

### **C. F&WW's Argument In Favor of Standing**

F&WW presented no live witnesses and introduced no evidence other than the Declarations in support of its contention that it had standing to bring the Appeal.

With respect to standing requirements of an organization, F&WW argued (and acknowledged) that the Delaware Supreme Court's decision in *Dover Historical Society v.*

*City of Dover Planning Commission*<sup>14</sup> requires that the following three elements be met: (1) at least one individual member who would otherwise have standing; (2) the interests of the organization are germane to the interest sought to be protected; and (3) individual members are not needed to participate in the litigation. F&WW argued that because DNREC did not challenge the second or third requirement, the sole issue before the Board was whether one or more individual members of F&WW had standing to bring this appeal in their own right. Relying on the Payan and Phillips declarations, F&WW contended that, as an organization, it had standing because each of those two declarations demonstrated that Payan and Phillips were persons “substantially affected” as required under § 6008(a).<sup>15</sup> In other words, F&WW contended that the Payan and Phillips declarations support individual standing of Payan and Phillips under *Oceanport* because each demonstrated a claim of injury in fact and that the interest sought to be protected by the party was arguably within the zone of interest to be protected by the statute at issue.<sup>16</sup>

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

At the conclusion of argument by the parties, the Board entered into executive session as permitted by 7 *Del. C.* §6008(a)<sup>17</sup> to deliberate on the Motions for Summary Judgement with respect to the issue of standing.<sup>18</sup>

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<sup>14</sup> 838 A.2d 1103, 1114 (Del. 2003)

<sup>15</sup> For this apparent reason, F&WW did not cite or rely on the Lovera declaration in its argument and, consequently, the Board did not consider it or rely on it in reaching this decision.

<sup>16</sup> 636 A.2d 892 (Del. 1994)

<sup>17</sup> 7 *Del. Admin. C.* § 6008(a) states, in pertinent part, “[d]eliberations of the Board may be conducted in executive session.”

<sup>18</sup> See Hearing Transcript, p. 58.

After deliberation and careful review of the parties' arguments, their written submissions, and the evidence presented, the Board denies, by a vote of 5 to 2,<sup>19</sup> F&WW's Motion for Summary Judgment in its entirety and grants, by a vote of 5 to 2, DNREC's Cross Motion for Summary Judgment solely on the basis that F&WW has failed to establish standing to bring the Appeal. Because standing is a threshold issue, the remainder of the parties' arguments on the merits of the Appeal contained in their respective Motions for Summary Judgment are now moot. Therefore, the Board need not decide those matters.<sup>20</sup>

As previously noted, the statutory requirements for standing to bring an appeal before this Board are set forth in 7 *Del. C.* § 6008(a) and in the Board's regulations.<sup>21</sup> Section 6008(a) of Title 7 states, in relevant part: "Any 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).

Because F&WW is an organization, it must meet the three-part test for associational standing as articulated in *Dover Historical Society v. City of Dover Planning Commission*.<sup>22</sup> The parties do not dispute that the sole requirement at issue under *Dover*

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<sup>19</sup> Board Members Gordon Wood and Sebastian LaRocca voted against granting DNREC's Cross Motion for Summary Judgment and voted in favor of granting F&WW's Motion for Summary Judgment.

<sup>20</sup> A motion for summary judgment is a case-dispositive motion. Unless an Appellant shows standing, this Board does not have jurisdiction to hear the appeal.

<sup>21</sup> See 7 *Del. Admin. C.* § 105.1.1 ("Pursuant to 7 *Del. C.* § 6008, any person whose interest is substantially affected by any action of the Secretary may appeal to the Environmental Appeals Board . . .").

<sup>22</sup> See 838 A.2d 1103, 1115 (Del. 2003) (citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, at 343 (1977)); *Oceanport*, 636 A.2d at 902.



*Historical Society's* three-part test is whether the F&WW's individual members (i.e. Payan and Phillips) have standing under the *Oceanport* requirements.<sup>23</sup>

The Delaware Supreme Court held in *Oceanport* that the term “substantially affected” as used in 7 *Del. C.* § 6008(a) means that a person must show there is “injury in fact” and that such person has an interest “arguably within the zone of interest to be protected or regulated by the statute.”<sup>24</sup> Moreover, the injury in fact must be an invasion of a legally protected interest<sup>25</sup> which is (1) “concrete and particularized,” and (2) “actual or imminent, not conjectural or hypothetical.”<sup>26</sup> In addition, a person must also show a causal connection between the injury and the conduct about which the person has complained.<sup>27</sup> In other words, the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the Board.<sup>28</sup> Finally, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision from this Board.<sup>29</sup>

Under the holding in *Oceanport*, F&WW bears the burden of proof to establish its members' standing and must show that its members have suffered an injury in fact that is

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<sup>23</sup> Because the Board concludes, *infra*, that none of the three members of F&WW has met the critical components of the standing test, the Board finds it unnecessary to analyze the first two requirements of whether F&WW as an organization has standing to assert its members' injuries. If the individual members of F&WW cannot meet the standing requirements on their own, the organization will consequently fail to meet the requirements of standing.

<sup>24</sup> *Oceanport*, 636 A.2d at 904.

<sup>25</sup> *Eastern Shore Environmental, Inc. v. Delaware Solid Waste Authority*, 2002 WL 440413 (Del. Super. Feb. 26, 2014).

<sup>26</sup> *Id.*

<sup>27</sup> *Dover Historical*, 838 A.2d at 1110; *Oceanport*, 636 A.2d at 904.

<sup>28</sup> *Id.*; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 2136 (1992).

<sup>29</sup> *Id.*

within the zone of interest sought to be protected (*i.e.*, that its members have been “substantially affected” by the Secretary’s Order). The Board believes that F&WW has failed to establish by its record evidence and by oral and written arguments that its members have been “substantially affected” by the Secretary’s Order. The facts here fail to show that the members of F&WW have a “concrete and particularized” injury as well as an “actual or imminent” injury or harm that is not “conjectural or hypothetical.”<sup>30</sup> Moreover, the members cannot show that their injuries are fairly traceable to the General Permit or the Order. Finally, the injuries alleged by the members of F&WW are more like an injury or harm suffered or shared by the public generally. Therefore, we find that the members of F&WW have failed to show that their interests were substantially affected by an action of the Secretary.

First, although injuries to recreational interests sufficiently qualify as an injury in fact,<sup>31</sup> such injuries cannot be conjectural or hypothetical. Payan stated in her declaration that she no longer enjoys the same recreational activities as she once did. For example, Payan no longer swims and does other recreational activities that involve direct contact with waterways, she no longer fishes and crabs like she used to do, and enjoys less her recreation near Delaware beaches, rivers, and streams because she believes agricultural pollution in the state waters *may cause harm* to her health and the health of others. These

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<sup>30</sup> The Board notes that it was disadvantaged by the fact that live witnesses were not present at the hearing and that the Board could not question the F&WW members who submitted the Declarations in support of F&WW’s Motion for Summary Judgment. The Board further notes that the Declarations were not signed under oath and therefore not sworn affidavits.

<sup>31</sup> See *Dover Historical Society*, 838 A.2d at 1114; *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 182-83 (2000).

allegations qualify more as conjectural or hypothetical injury rather than a concrete and particularized injury. Phillips stated her knowledge of CAFO pollution lessens her enjoyment of paddling or patrolling or when she recreates on rivers. However, Phillips has not stopped her recreational activities or otherwise changed her behavior based on the Secretary's actions or the issuance of the Order.

Next, it is recognized that there may be various sources of pollution, other than CAFOs, to the receiving waters of the state; however, for this Appeal the F&WW members should have but did not, show that their injuries are fairly traceable to the General Permit or the Order. The members of F&WW have alleged a generalized fear of pollution from CAFOs and changed their actions based on such fears, but they have presented no evidence that CAFOs in particular have caused pollution in state waters and thereby caused their injuries to recreational activities. Payan stated that she has curtailed her recreational activities because she knows about agricultural pollution in these waters. However, Payan presented no evidence that her changed actions were the direct result of the issuance of the General Permit or were caused directly by pollution from CAFOs. In fact, none of the F&WW's evidence showed a direct connection between a member's fear of water pollution and the alleged pollution caused from CAFOs only. Rather, the F&WW members' complaints focused on the potential for infection from livestock and human waste. Moreover, we noted that all of the alleged injuries suffered by the F&WW members were the exactly same both before and after the issuance of the Order which allowed CAFOs to obtain NPDES permit coverage. The members' fears of water pollution may have caused them to curtail their recreational activities, but such fears did not stem from a direct correlation between water pollution caused by CAFOs and water pollution caused by some

third party. Hence, such injuries fail to qualify as fairly traceable to the General Permit or the issuance of the Order.

Finally, the injuries alleged by the members of F&WW are more like an injury or harm suffered or shared by the public generally. Phillips alleged no facts to show that she was concerned that the construction of more CAFOs in Delaware would increase the threat of CAFO pollution. She also stated that her knowledge of pollution from CAFOs made her recreational activities less enjoyable. However, Phillips does not reside in Delaware and has not presented any concrete facts to show that she has been harmed by recreating in Delaware state waters on any particular occasion. Phillips simply showed alleged injuries that were more like those of the general public. Although Payan stated facts that showed she had curtailed her recreational activities, her behavior was based on generalized fears of pollution from CAFOs. In addition, she was concerned about spending her own time and resources in conducting water quality monitoring and in training others to conduct water quality monitoring to protect the public's health and safety. Again, these alleged injuries are more akin to those of the public in general and seem indistinguishable from those of other members of the public. We find no facts to support a contrary conclusion.

In conclusion, based on the undisputed facts alleged in F&WW's declarations and the arguments made by F&WW in support of its Motion for Summary Judgment, all of which are viewed in a light most favorable to F&WW, the Board finds that F&WW has not established that any of its members have been "substantially affected" by the Secretary's Order. F&WW's contentions are not distinguishable from those that could be raised by the general public. F&WW is advocating, in essence, for the public at large and has provided no factual basis to demonstrate that it has a unique personal stake in the

matter, that its "injuries" are concrete and particularized, and that such injuries are more than mere concerns regarding environmental problems affecting the public at large. Thus, F&WW has no standing to bring the Appeal and has no legal right to have it heard by this Board.

**IT IS SO ORDERED**, this 1<sup>ST</sup> day of March, 2017.

**ENVIRONMENTAL APPEALS BOARD**

The following five Board members concur in this decision.<sup>32</sup>

Date: March 1, 2017

Nancy J. Shevock  
Nancy Shevock  
Chairperson

Date: \_\_\_\_\_

\_\_\_\_\_  
Guy Marcozzi  
Board Member

Date: \_\_\_\_\_

\_\_\_\_\_  
Dean Holden  
Board Member

Date: \_\_\_\_\_

\_\_\_\_\_  
Robert Mulrooney  
Board Member

Date: \_\_\_\_\_

\_\_\_\_\_  
Michael Horsey  
Board Member

<sup>32</sup> On the sole issue of standing that was before the Board, Member Gordon Wood and Member Sebastian LaRocca each voted against granting DNREC's Motion for Summary Judgment and voted in favor of granting F&WW's Motion for Summary Judgment. Accordingly, neither concur in the decision of the Board to dismiss the Appeal for lack of standing. However, both Mr. Wood and Mr. LaRocca have signed this Final Decision and Order in conformity with the requirements of 7 Del.C. § 6008(d), which requires that the "decision of the Board shall be signed by all members who were present at the hearing."

matter, that its "injuries" are concrete and particularized, and that such injuries are more than mere concerns regarding environmental problems affecting the public at large. Thus, F&WW has no standing to bring the Appeal and has no legal right to have it heard by this Board.

**IT IS SO ORDERED**, this \_\_\_\_ day of March, 2017.

**ENVIRONMENTAL APPEALS BOARD**

The following five Board members concur in this decision.<sup>32</sup>

Date: \_\_\_\_\_

\_\_\_\_\_  
Nancy Shevock  
Chairperson

Date: 3/1/17

\_\_\_\_\_  
Guy Marcozzi  
Board Member

Date: \_\_\_\_\_

\_\_\_\_\_  
Dean Holden  
Board Member

Date: \_\_\_\_\_

\_\_\_\_\_  
Robert Mulrooney  
Board Member

Date: \_\_\_\_\_

\_\_\_\_\_  
Michael Horsey  
Board Member

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matter, that its "injuries" are concrete and particularized, and that such injuries are more than mere concerns regarding environmental problems affecting the public at large. Thus, F&WW has no standing to bring the Appeal and has no legal right to have it heard by this Board.

IT IS SO ORDERED, this \_\_\_\_\_ day of March, 2017.

**ENVIRONMENTAL APPEALS BOARD**

The following five Board members concur in this decision.<sup>11</sup>

Date: \_\_\_\_\_

\_\_\_\_\_  
Nancy Shevock  
Chairperson

Date: \_\_\_\_\_

\_\_\_\_\_  
Guy Marcozzi  
Board Member

Date: 3-1-2017

  
\_\_\_\_\_  
Dean Holden  
Board Member

Date: \_\_\_\_\_

\_\_\_\_\_  
Robert Mulrooney  
Board Member

Date: \_\_\_\_\_

\_\_\_\_\_  
Michael Horsey  
Board Member

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*Environmental Appeals Board*  
*Appeal No. 2016-06 (Food & Water Watch)*

matter, that its "injuries" are concrete and particularized, and that such injuries are more than mere concerns regarding environmental problems affecting the public at large. Thus, F&WW has no standing to bring the Appeal and has no legal right to have it heard by this Board.

IT IS SO ORDERED, this \_\_\_\_ day of March, 2017.

**ENVIRONMENTAL APPEALS BOARD**

The following five Board members concur in this decision.<sup>32</sup>

Date: \_\_\_\_\_

\_\_\_\_\_  
Nancy Shevock  
Chairperson

Date: \_\_\_\_\_

\_\_\_\_\_  
Guy Marcozzi  
Board Member

Date: \_\_\_\_\_

\_\_\_\_\_  
Dean Holden  
Board Member

Date: 3/2/2017

  
\_\_\_\_\_  
Robert Mulrooney  
Board Member

Date: \_\_\_\_\_

\_\_\_\_\_  
Michael Horsey  
Board Member

<sup>32</sup> On the sole issue of standing that was before the Board, Member Gordon Wood and Member Sebastian LaRocca each voted against granting DNREC's Motion for Summary Judgment and voted in favor of granting F&WW's Motion for Summary Judgment. Accordingly, neither concur in the decision of the Board to dismiss the Appeal for lack of standing. However, both Mr. Wood and Mr. LaRocca have signed this Final Decision and Order in conformity with the requirements of 7 Del.C. § 6008(d), which requires that the "decision of the Board shall be signed by all members who were present at the hearing."



*Environmental Appeals Board  
Appeal No. 2016-06 (Food & Water Watch)*

matter, that its "injuries" are concrete and particularized, and that such injuries are more than mere concerns regarding environmental problems affecting the public at large. Thus, F&WW has no standing to bring the Appeal and has no legal right to have it heard by this Board.

**IT IS SO ORDERED**, this \_\_\_\_ day of March, 2017.

**ENVIRONMENTAL APPEALS BOARD**

The following five Board members concur in this decision.<sup>32</sup>

Date: \_\_\_\_\_

\_\_\_\_\_  
Nancy Shevock  
Chairperson

Date: \_\_\_\_\_

\_\_\_\_\_  
Guy Marcozzi  
Board Member

Date: \_\_\_\_\_

\_\_\_\_\_  
Dean Holden  
Board Member

Date: \_\_\_\_\_

\_\_\_\_\_  
Robert Mulrooney  
Board Member

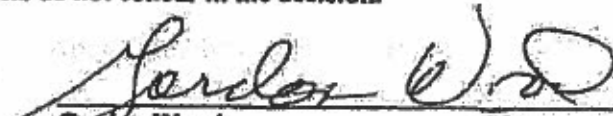
Date: 3/2/17

  
\_\_\_\_\_  
Michael Horsey  
Board Member

<sup>32</sup> On the sole issue of standing that was before the Board, Member Gordon Wood and Member Sebastian LaRocca each voted against granting DNREC's Motion for Summary Judgment and voted in favor of granting F&WW's Motion for Summary Judgment. Accordingly, neither concur in the decision of the Board to dismiss the Appeal for lack of standing. However, both Mr. Wood and Mr. LaRocca have signed this Final Decision and Order in conformity with the requirements of 7 Del.C. § 6008(d), which requires that the "decision of the Board shall be signed by all members who were present at the hearing."

**Environmental Appeals Board**  
**Appeal No. 2016-06 (Food & Water Watch)**

The following two Board members do not concur in the decision.

Date: 3/1/17   
Gordon Wood  
Board Member

Date: \_\_\_\_\_  
Sebastian LaRocca  
Board Member

*Environmental Appeals Board  
Appeal No. 2016-06 (Food & Water Watch)*

The following two Board members do not concur in the decision.

Date:

Gordon Wood  
Board Member

Date: *MAR. 1, 2017*

*Sebastian A. LaRocca*  
Sebastian LaRocca  
Board Member