

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

JOHN A. NICHOLS,)	
)	
Appellant,)	
)	
v.)	EAB Appeal No. 2019-04
SECRETARY M. SHAWN GARVIN)	
AND THE DELAWARE DEPARTMENT)	
OF NATURAL RESOURCES AND)	
ENVIRONMENTAL CONTROL,)	
)	
Appellee.)	

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 September 24, 2019, 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: Dean Holden (Chair), Michael Horsey, Frances Riddle and Randall Horne. No Board Members disqualified themselves or were otherwise disqualified. Deputy Attorney General Kevin P. Maloney represented the Board.

Appellant John A. Nichols (“Appellant”) appeared pro se. Deputy Attorney General Jameson A. L. Tweedie represented Appellee Delaware Department of Natural Resources and Environmental Control (“DNREC”).

STATEMENT OF THE CASE AND PROCEEDINGS

On April 22, 2019, DNREC issued Secretary's Order No. 2019-A-0019 (the "Order") which authorized issuance of two air construction permits to Diamond State Generating Partners, LLC ("Bloom") relating to the replacement of existing fuel cells at Bloom's Red Lion and Brookside facilities. On May 6, 2019, the Appellant filed a Notice of Appeal pursuant to 7 *Del. C.* §§ 6008 and 6009 (the "Appeal"). Appellee filed Motions to Dismiss on both lack of standing and lack of subject matter jurisdiction grounds.

MATTERS BEFORE THE BOARD

Prior to the hearing of evidence and argument on the merits of the appeal, the Board considered DNREC's Motion to Dismiss for lack of standing and subject matter jurisdiction. The Board also considered Appellant's written response to the Motions to Dismiss. DNREC presented oral argument on its motion (in favor of dismissal), followed by oral argument by Appellant in opposition to the motion (in opposition to dismissal).

A. DNREC's Motion to Dismiss

In its Motion to Dismiss DNREC requests that the Board dismiss Appellant's appeal. DNREC argues in its motion and before the Board that the Appellant does not have standing pursuant to the statutory requirement set forth in 7 *Del. C.* §6008(a) to pursue his appeal. Specifically, DNREC argues that the Appellant is not "substantially affected" by the Secretary's Order, as required by the express language in § 6008(a) as interpreted by the Delaware Supreme Court in the case of *Oceanport Industries, Inc. v. Wilmington Stevedores*,¹ because Appellant has not suffered an "injury-in-fact". DNREC contends that, to invoke standing before the Board, the

¹ 636 A. 2d 892 (Del. 1994).

Appellant's injury cannot be an injury or harm suffered or shared by the public generally. Rather, the Appellant must prove that the injury is "concrete and particularized" and "actual or imminent" and not "conjectural or hypothetical", as required by the standard established by *Oceanport Industries*. DNREC distinguishes this stricter standard from the broader, more generalized standard applicable to the public hearing stage of the permit process. DNREC contends that the Appellant has failed to satisfy his burden of proof to establish standing and therefore his appeal must be dismissed.

DNREC also argues in its Motion to Dismiss that the Board lacks subject matter jurisdiction over the appeal and that the lack of subject matter jurisdiction should act independently from the issue of standing and deprive the Board of authority to adjudicate the appeal.

B. Appellant's Response To DNREC's Motions To Dismiss

Appellant requests that the Board deny the DNREC Motion to Dismiss. Appellant contends that he has standing to challenge the Order because he is a resident of Delaware and will be "personally affected by whatever environmental harm might result" from the Order and that he is a long-time Delmarva Power ratepayer who has been paying the QFCP tariff on his monthly electric bills.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board entered into executive session as permitted by 7 *Del. C.* §6008(a) to deliberate and consider the parties written submissions, and the arguments presented. By a vote of 4 to 0, the Board granted Appellee's Motion to Dismiss, on the basis that the Appellant has failed to meet his burden of proof to establish standing to bring this appeal for the reasons which follow. By granting the Motion to Dismiss for lack of standing, the additional argument made by DNREC on

subject matter jurisdiction grounds, is rendered moot and therefore need not be decided by the Board.²

As noted *supra*, the statutory requirements for standing to bring an appeal before this Board are set forth in § 6008(a) and in the Board's regulations. "Standing is a threshold question" to ensure the party is in fact entitled to mount a legal challenge.³ Section 6008(a) 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."

The dispositive issue on the motions to dismiss for lack of standing is what the statutory term "substantially affected" means and, based on that meaning, whether the Appellant's interests are "substantially affected" by the Secretary's Order. The Delaware Supreme Court directly addressed this question in the *Oceanport Industries, Inc. v. Wilmington Stevedores*, which is applicable legal precedent that this Board is bound to follow.

In *Oceanport Industries*, the Court noted that the General Assembly had not defined the term "substantially affected" when it enacted § 6008(a). The Court also noted that the General Assembly "provided a role for the participation of the general public in the protection of natural resources by establishing a minimal standing requirement for involvement in hearings during permit process", citing § 6004(b).⁴ Once a permit has issued, as it has been in this matter, the standing requirement "becomes the more stringent 'substantially affected' test..." To that end, the

² A motion to dismiss is a case dispositive motion. Absent a showing of standing by an Appellant, this Board does not have jurisdiction to hear an appeal.

³ *Dover Historical Soc. V. City of Dover Planning Comm'n*, 838 A. 2d 1103, 1110 (Del. 2003).

⁴ Section 6004(b) states, in pertinent part, "The Secretary shall hold a public hearing on an application, if he or she receives a meritorious request for a hearing within a reasonable time as stated in the advertisement" and "[a] public hearing may be held on any application if the Secretary deems it to be in the best interests of the State to do so" and "[a] public hearing request shall be deemed meritorious if it exhibits a familiarity with the application and a reasoned statement of the permit's probably impact."

Court held that a party must show in “injury in fact” and that such injury is within the zone of interest sought to be protected by the statute.

Furthermore, in a later case appealed from a decision of this Board, the Delaware Superior Court, in *Eastern Shore Environmental, Inc. v. Delaware Solid Waste Authority*⁵, similarly set forth the requirements for standing before this Board. The Superior Court, citing the prior holdings of the Delaware Supreme Court in *Oceanport Industries* and *Dover Historical Society v. City of Dover Planning Commission*⁶, held that an “injury in fact” is an *invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.*” (Emphasis added).

Under *Oceanport Industries*, the Appellant bears the burden of proof to establish standing and is required to show that he has suffered an injury in fact and that such injury is within the zone of interest sought to be protected (*i.e.*, that he has been “substantially affected” by the Order). Appellant’s evidentiary showing and argument (written and oral) before the Board, however, has failed to establish that he personally has been “substantially affected” by the Secretary’s Order, based on the statutory requirement for standing as set forth in § 6008(a), as the term “substantially affected” has been interpreted and defined by the Delaware Courts.

The Board finds Appellant is a resident of Delaware. The Board finds that Appellant is proceeding pro se. The Board commends Appellant for his commitment and passion to the cause of Delaware’s environment and appreciates his determined presentation of his case. It cannot, however, find that Appellant has suffered an injury because of the Order that is “particularized and concrete” or distinguishable from the public at large. Regardless of how sincere the Appellant’s interest is in preserving the environment, his legally protected interest in the quality

⁵ 2004 WL 440413 (Del. Super. Feb. 26, 2004)

⁶ 838 A.2d 1103 (Del. 2003)

of Delaware's air is no different from any other member of the public's legally protected interest in air quality. "The mere allegation of a sincere interest in an environmental problem is not sufficient to confer standing."⁷ Appellant has not pointed to anything in the Order that substantially affects his legally protected interests. Nothing in the Order affects Appellant in a personal or individual manner as compared to the Order's impacts on the general public.

Considering the facts alleged in Appellant's Statement of Appeal, the facts alleged in his written response to the motion to dismiss, as well as the evidence presented at the hearing, all viewed in a light most favorable to Appellant, the Board finds that the Appellant has not established that he has been "substantially affected" by the Secretary's Order. Appellant's contentions, while articulately presented, are not distinguishable from those that could be raised by the general public. Appellant is, in essence, advocating for the public at large and has provided no factual basis to demonstrate that he has a unique personal stake in the matter and that his "injuries" are concrete and particularized, and more than generalized concerns regarding potential environmental harms. Thus, Appellant has no standing to pursue his appeal and the motion to dismiss for lack of standing is properly granted.

⁷ *Oceanport Indus., Inc.*, 636 A. 2d at 905.

IT IS SO ORDERED, this 15th day of November, 2019.

Dean Holden, Chairperson

The following Board members concur in this decision.

Date: _____

Michael Horsey
Board Member

Date: _____

Frances Riddle
Board Member

Date: _____

Randall Horne
Board Member

EAB Appeal No. 2019-04 Decision and Final Order


Date: Nov. 15, 2019



Dean Holden/Chairperson

EAB Appeal No. 2019-04 Decision and Final Order

Date: 11/27/19



Michael Horsey, Board Member

EAB Appeal No. 2019-04 Decision and Final Order

Date: 11/15/19



Frances Riddle, Board Member

EAB Appeal No. 2019-04 Decision and Final Order

Date: 11/27/19


Randall Horne, Board Member