

## **CHAPTER NINE: ADMINISTRATIVE PROCEEDINGS: PUBLIC HEARINGS, ENVIRONMENTAL APPEALS BOARD (EAB) HEARINGS, AND APPEALS FROM EAB DECISIONS**

### **SECTION I. INTRODUCTION**

This section of DNREC's Compliance and Enforcement Policy addresses Public Hearings, Environmental Appeals Board (EAB) Hearings, and Appeals from EAB Decisions.

### **SECTION II. PUBLIC HEARINGS**

#### **A. SCOPE**

Public Hearings include, but are not limited to, hearings held on behalf of the public relating to the promulgation of rules, regulations, and plans, permit applications and permits, and alleged violations contained in Administrative Orders, including penalty assessments, variance requests, and hearings related to cost recovery billings. These hearings are presided over by the Department's Hearing Officer, who, based on findings of fact at the hearing, makes a recommendation to the Secretary. The Secretary's final determination is then set forth in the form of an Order, which outlines the facts, issues, and reasons for his/her final determination.

#### **B. PROCEDURES**

Whether on a permit application or on an administrative enforcement action, DNREC follows certain statutory requirements in providing a public hearing. DNREC must give twenty (20) days specialized notice by certified mail and by publication in certain newspapers. The applicant or violator may produce any competent evidence in its behalf. Subpoenas shall be issued at the request of either the applicant and/or violator. In the case of refusal by a party to obey a notice of hearing or subpoena that has been issued, the Superior Court in the county in which the hearing is held has the jurisdiction and authority, at the request of the Secretary, to issue an Order requiring the subpoenaed party to appear, testify, and/or produce evidence as the case may require. 7 Del. C. § 6006.

#### **C. HEARING OFFICER**

Public Hearings are conducted by a Hearing Officer, who, based upon the record generated in each case, makes recommended findings of fact, conclusions of law, and sanctions. DNREC has on staff a full-time Hearing Officer. Occasionally, directors and others will also serve as the Hearing Officer. The individual who will serve as the Hearing Officer for each case is appointed by the Secretary. The Hearing Officer, acting as the duly authorized designee of the Secretary, may administer oaths, issue subpoenas, and question witnesses.

## **D. PUBLIC RECORD**

All of the documentation received by the Hearing Officer from the parties involved, both in preparation for, during, and subsequent to the hearing(s) held in each case, constitutes what is known as the public record. The public record may consist of, but is not limited to, copies of the published hearing notices, exhibits submitted by any of the involved parties, a copy of the actual recorded transcript generated as a result of the public hearing, and any other tangible documentation introduced by the Secretary or other party to each case.

Often, the Hearing Officer will leave the record open after the public hearing has concluded, in order to receive agreed-upon post-hearing written submissions. If the record is left open subsequent to the conclusion of the public hearing, all parties are advised as to when the record will formally close, and are instructed to provide all requested post-hearing documentation to the Hearing Officer on or before the date on which the public record will be closed.

## **E. HEARING OFFICER'S REPORT**

After the public record has been formally closed on a particular case, the record generated in that matter is then reviewed in its entirety by the Hearing Officer. At that time, the Hearing Officer prepares a written report on the matter and submits the same to the Secretary for review and action. The Hearing Officer's Report consists of the following: (1) a background summary of the issues surrounding each case; (2) the findings of fact based upon the public record generated in the case; (3) the legal conclusions arrived at as a result of the Hearing Officer's review of the entire public record; and (4) the recommendations made to the Secretary by the Hearing Officer concerning action to be taken in each matter.

## **F. SECRETARY'S ORDER**

After receipt and review of the Hearing Officer's Report in each case, the Secretary then signs an Order that will best further the purpose of Delaware law with respect to conservation and environmental control mandates (7 Del. C., Chapter 60). The Secretary's Order includes reasons for the actions to be taken concerning the issues surrounding the public hearings. All parties involved in or affected by the Order are given written notice of the same by the Secretary.

# **SECTION III. HEARINGS BEFORE THE ENVIRONMENTAL APPEALS BOARD**

## **A. SCOPE**

Another type of administrative hearing, separate from the hearings conducted by the Department's Hearing Officer, is an appeal before the Environmental Appeals Board (EAB). The EAB hears appeals of case decisions rendered by DNREC. Decisions expressly appealable to the EAB include those involving the following Chapters of Title 7:

Chapter 60, General Environmental Protection, § 6007(b);

Chapter 63, Hazardous Waste Management § 6313;  
Chapter 66, Wetlands, § 6610;  
Chapter 71, Noise Control and Abatement, § 7113(a);  
Chapter 72, Subaqueous Lands, §7210;  
Chapter 74, Underground Storage Tanks, §7412; and  
Chapter 77, Extremely Hazardous Substances Risk Management, §7717.

Any person whose interest is “substantially affected” may appeal to the EAB, pursuant to 7 Del. C. § 6008(a). To prove standing under the “substantially affected” standard, a party is required to show an injury in fact, and that such injury is within the zone of interest sought to be protected by the statute. Oceanport Indus., Inc. v. Wilmington Stevedores, Inc., Del. Supr., 636 A.2d 892 (1994). A sole claim of economic injury is not enough. Id. A party claiming standing respecting an environmental problem must show that alleged environmental injury will actually affect it. Id.

## **DEPUTY ATTORNEY GENERAL REPRESENTATION**

One Deputy will represent DNREC, and another Deputy will represent the EAB. The Deputies must be careful not to engage in ex parte communications. This arrangement may raise questions with some, but the mere status of the Deputies as employees in the same agency is not a violation of due process or otherwise unfair. The mere prosecution of a case by one Deputy before another Deputy acting in an adjudicatory capacity is not sufficient to overcome the strong presumption of honesty and integrity in those serving as adjudicators, in the absence of specific evidence of bias. Blinder, Robinson & Co. v. Bruton, Del. Supr., 552 A.2d 466 (1989).

## **B. PROCEDURE**

### **1. Timing:**

The appeal to the EAB must be made “within 20 days after receipt of the Secretary’s decision or publication of the decision.” 7 Del. C. § 6008(a). The Board considers the 20 day appeal limit to be a jurisdictional limitation, and where an appeal is not filed within the time given, the Board lacks jurisdiction to consider the appeal. Appeal of the Delaware Waterman’s Association, Inc., EAB No. 92-10 (July 21, 1993).

### **2. Filing:**

All written statements shall be completed and addressed to the Environmental Appeals Board, 89 Kings Highway, Dover, Delaware 19901, attention: Administrative Assistant to the Environmental Appeals Board. EAB Reg. § 102(e).

### **3. Form:**

The request for an appeal shall be submitted in the form of a written statement. The statement shall set forth clearly and concisely the following: 1) the interest which has been substantially affected; 2) an allegation that the decision is improper; and 3) the reasons why the decision is improper. The

request for appeal should be stated with sufficient specificity to notify the Board and DNREC of the reasons for the appeal. The written statement shall also set forth an estimate of the number of witnesses and the time involved in preventing the appeal at the public hearing. EAB Reg. §§ 102(a) and (b).

4. Costs:

A \$50 “deposit for costs” shall accompany the statement of appeal. EAB Reg. § 102(c). Presumably, this is more accurately described as a payment for costs of the Board, and no further costs will be assessed.

5. Scheduling of Hearing:

The Board shall schedule, but not necessarily conduct, a hearing within 30 days following the receipt of the appeal. The EAB shall conduct, but not necessarily complete, the hearing within 180 days following the receipt of the appeal unless the parties agree otherwise. 7 Del. C. § 6007(c).

6. Quorum:

A simple majority of the EAB shall constitute a quorum. A simple majority of those members of the EAB present shall be required to override the decision of the Secretary. 7 Del. C. § 6007(c).

7. Witness and Documents Lists:

At least 10 days prior to the date set for the pre-hearing conference, DNREC and the appellant shall submit to the Deputy Attorney General assigned to the EAB (“EAB Deputy”) and to each other a list of witnesses and documents and other evidence proposed to be entered into evidence at the hearing. The parties shall submit final witness and documents lists and shall raise all objection to such witnesses and documents at the pre-hearing conference. Evidence not so identified shall be admitted into evidence only on a showing of reasonable cause. Evidence not identified may be introduced for purposes of rebuttal or surrebuttal at the discretion of the Board. EAB Reg. §§ 103(b), (c) and (d).

8. Discovery:

Generally, there is no discovery in administrative proceedings. There is no absolute due process right to engage in discovery as a matter of course. See Kotler, *supra* (in proceeding subject to the APA). The EAB’s Regulations provide for discovery by consent of the parties. EAB Reg. § 103(g).

9. Pre-Hearing Conference:

At least 20 days prior to the hearing, the EAB Deputy shall conduct a pre-hearing conference by telephone or in person. The purposes of the conference include identifying undisputed facts, identifying the witnesses and receiving a brief summary of the testimony of the witnesses, identifying documents, resolving procedural matters, and identifying issues. After the

pre-hearing conference, the EAB Deputy may provide the Board members with the list of witnesses, documents, and a memo summarizing the issues on appeal. EAB Reg. §§ 103(a) and (e).

#### 10. Subpoenas:

The Board is empowered to issue subpoenas by certified mail for witnesses or evidence. 7 Del. C. §§ 6006(3) and 6007(b). Parties requesting subpoenas shall do so no later than 15 days before the date of the hearing. EAB Reg. § 103(f).

#### 11. Date of Hearing.

Hearings are conducted on the second and fourth Tuesdays of each month. EAB Reg. § 105.

### **D. ADMINISTRATIVE PROCEDURES ACT**

The EAB is also subject to the Administrative Procedures Act. 29 Del. C. § 10161(a)(9). The EAB is required to give 20 days notice, in a particular format, prior to the hearing. 29 Del. C. § 10122. The EAB's power and conduct requirements for the hearing are found in 29 Del. C. § 10125. For example, the EAB is empowered to issue subpoenas for witnesses and other sources of evidence, either on the EAB's initiative or at the request of any party.

### **E. CHRONOLOGY/RECORD**

The EAB uses the term "chronology" for selected documents from the record of the proceedings below. The chronology should include the final letter or other document indicating the action of the Secretary, the permit if applicable, the Hearing Officer's Report if applicable, the transcript of the hearing before the Secretary unless the Board determines that it is impracticable to provide such transcript. The chronology shall be available for copying by the parties no later than five days before the pre-hearing conference. The chronology shall also include all statements of appeal. EAB Reg. §§ 104(a) and (b). The record before the EAB shall include the entire record before the Secretary. 7 Del. C. § 6008(b).

The parties may agree, or counsel for the EAB may order the parties, to submit pre-hearing memoranda and documentary evidence, which may be provided to the Board members prior to the hearing. See EAB Reg. § 104(c).

### **F. EVIDENCE**

The EAB may exclude any evidence which is plainly irrelevant, immaterial, insubstantial, accumulative, or unduly repetitive, and may limit unduly repetitive proof, rebuttal, and cross-examination. 7 Del. C. § 6008(b). The EAB has the power to expand upon the record by accepting competent evidence produced by any party to the appeal. Tulou v. Raytheon Service Co., Del. Super., 659 A.2d 796 (1995). Where the hearing before the Board is the initial hearing, the Board "should provide a full opportunity to present

evidence on the subjects which are relevant to [the] merits of the Secretary's order." T.V. Spano Bldg. Corp. v. Wilson, Del. Super., 584 A.2d 523, 530 (1990) (finding that the Board improperly limited evidence to information only available before a particular date).

On the other hand, where there is a full hearing below before the Secretary, evidence that could have been presented below should not be received for the first time on appeal. If the Board had concluded that the new evidence materially undermined the Secretary's decision, the only proper procedure would be a simple remand for the Secretary to consider the new evidence. Tunnell Companies, L.P./Baywood Greens Permit, EAB Appeal No. 97-01 (January 7, 1998).

Non-parties shall not present evidence. Appellants other than permit applicants or an alleged violator may only introduce evidence which was before the Secretary. Strict rules of evidence shall not apply. All evidence having probative value commonly accepted by a reasonably prudent person in the conduct of his or her affairs shall be admitted. EAB Reg. §§ 105(c) and (d). In practice, the EAB will usually admit evidence, deeming any objections to go to weight and not admissibility.

#### **G. ORDER OF PROOF AT HEARING**

Following opening statements, each party shall have an opportunity to produce evidence in support of such party's position. The appellant(s) shall produce evidence first, followed by DNREC and then followed by the permittee, if any. After initial testimony and cross-examination, any witness may be examined by any member of the Board. Rebuttal and surrebuttal evidence will be allowed. EAB Reg. § 105(h). In practice, the Board will often ask questions during direct examination.

#### **H. BYPASS TO SUPERIOR COURT**

At any time after the appeal to the EAB, the parties may, by stipulation, proceed directly to Superior Court. If this becomes the case, the Court may affirm, reverse, or remand the Secretary's decision, based upon the record before the Secretary and the Board, as well as whatever evidence the parties may submit by stipulation. 7 Del. C. § 6008(g).

#### **I. STANDARD AND SCOPE OF REVIEW**

The burden of proof is upon the appellant to show that the Secretary's decision is not supported by the evidence on the record before the EAB. 7 Del. C. § 6008(b). Where the Secretary makes a decision involving consideration of technical evidence following an adversarial proceeding below, the EAB must give the Secretary's decision some deference, since the EAB is holding a second hearing. It is impossible to quantify how much deference is due. The EAB must treat with greater caution technical evidence which the Secretary did not hear and weigh because otherwise the hearing before the Secretary is unduly depreciated. Where there is a full adversarial proceeding and the weighing of technical evidence below, the Appellant "must prove to the Board that the Secretary lacked evidence to support his decision." Tulou v. Raytheon, Serv. Co., Del. Super., 659 A.2d 796, 806 (1995).

## **J. RELIEF AUTHORIZED**

The EAB may affirm, reverse, or remand with instructions to the Secretary. The EAB is not expressly authorized to, on its own, modify any permit or order of the Secretary. See 7 Del. C. § 6008(b).

## **SECTION IV. APPEAL FROM EAB TO SUPERIOR COURT**

### **A. SCOPE**

Any person(s) aggrieved by any decision of the EAB may appeal to the Superior Court by filing a petition, duly verified, setting forth that such decision is illegal, and specifying the grounds of the illegality. Any such appeal shall be perfected within 30 days of the receipt of the written opinion of the Board. 7 Del. C. § 6009(a). The EAB ordinarily will refuse to participate as a party before the Superior Court on an appeal of one of its decisions.

### **B. RELIEF AUTHORIZED**

The Court may affirm, reverse, or modify the Board's decision. However, the Board's findings of fact shall not be set aside, unless it is determined by the Court that the records contain no substantial evidence that would reasonably support said findings. The Court may find that additional evidence should be taken into consideration. If this becomes the case, then the Court may remand the case to the Board for completion of the record. 7 Del. C. § 6009(b).

### **C. STAY OF ACTION**

No appeal will automatically stay an action of the Secretary. However, upon application, the Board or the Court of Chancery may stay the action for good cause, pending disposition of the appeal. 7 Del. C. § 6009(c).