

## CAFO Permit Challenge: Delaware Court Addresses Standing Issue



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The Superior Court of Delaware (“Court”) addressed in an August 24th opinion an appeal from a Delaware Environmental Appeals Board (“Board”) decision addressing whether an interest group had organization standing. See *Food & Water Watch v. Delaware Department of Natural Resources and Environmental Control*, No. N17A-03-006 AML, 2018 WL 4062112 (Del. Super. Ct. August 24, 2018).

Food and Water Watch (“FWW”) filed challenges to a Board Order related to water quality monitoring by Concentrated Animal Feeding Operations (“CAFOs”) issued jointly by the Delaware environmental and agricultural agencies.

The Delaware Department of Natural Resources and Environmental Control (“DNREC”) and the Delaware Department of Agriculture (“DDA”) established a General Permit program for CAFOs in 2011. The General Permit dictates certain standards for Delaware CAFOs.

Eligible CAFOs can obtain this General permit if they submit a Notice of Intent and Nutrient Management Program to DNREC and DDA. The associated requirements do not include monitoring water on-site or in nearby streams for CAFO-generated pollutants.

Two members of FWW raised concerns about the lack of site-specific pollutant monitoring requirements. Affidavits submitted to the Board stated that both FWW members enjoyed recreational activities in Delaware’s waterways. Such activities included swimming, boating, kayaking, fishing, etc. The absence of pollutant monitoring was stated to be the reason both individuals ceased their previous recreational activities in Delaware’s waterways.

FWW describes itself as a non-profit public interest group that promotes environmental protection.

FWW filed an appeal with the Board. It argued that the absence of surface water discharge compliance monitoring violated the Clean Water Act.

The Board held that FWW lacked organizational standing because it could not demonstrate its members would have standing to sue in their individual capacity.

The Court applied Title 7, Section 6008(a) of the Delaware Code to determine whether the individuals had standing. This provision provides “any person whose interest is substantially affected by any action of the Secretary may appeal to the Environmental Appeals Board...”

The Delaware Supreme Court has interpreted “substantially affected” by analyzing a three-pronged test:

1. The party must have suffered an injury in fact. The injury must be concrete and particularized.
2. The injury must be fairly traceable to the challenged action of the defendant.

3. It must be likely that the injury will be redressed by a favorable decision, rather than merely speculative.

The Court first held that the members had suffered injury in fact because their aesthetic and recreational enjoyment of the affected areas has been lessened by the General Permit's lack of monitoring requirements. These injuries were deemed distinct from injuries suffered by people at large because the threat of water pollution has affected their activities in an individual and personal manner.

Second, the Court held that the members' recreational and aesthetic injuries are traceable to the lack of pollution monitoring in the General Permit's provisions.

Finally, the Court held that the members' injuries could be redressed by a favorable decision from the Board. The General Permit order would be reversed and the CAFO's would be required to monitor the water on-site and in nearby streams for CAFO-generated pollutants. As a result, the members could return to their recreational activities in Delaware's waterways.

The FWW's members were therefore held to have standing to sue in their own right. Consequently, FWW was held to satisfy all three requirements for organizational standing.

A [copy of the opinion](#) can be found here.