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IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEEP OUR WELLS CLEAN, GAIL SALOMON, EUGENIA GRACE NAVITSKI, VLAD ERIC NAVITSKI, THOMAS DIORIO, LYNN TAYLOR-MILLER, CHARLIE MILLER, and VIRGINIA WEEKS,	)	
Appellants,	)	
v.	)	No. 138,2020
DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL, And ARTESIAN WASTEWATER MANAGEMENT, INC.,	)	
Appellees.	)	

APPELLANTS' OPENING BRIEF

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NATURE OF THE PROCEEDINGS

This is an appeal from the Superior Court's March 19, 2020 decision ("Decision") affirming an order of the Environmental Appeals Board ("EAB" or "Board") issued on June 10, 2019 ("EAB Order"). The EAB Order affirmed Secretary's Order No. 2017-W-0029 ("Secretary's Order") by the Secretary of the Department of Natural Resources and Environmental Control ("Secretary" and "DNREC" as appropriate). The Secretary's Order approved issuance to Artesian Wastewater Management, Inc. ("Artesian") of a Spray Irrigation Construction Permit ("the 2017 Permit") for Phase 1 of the Artesian Northern Sussex Regional Water Recharge Facility ("ANSRWRF") near Milton, Sussex County.

On November 28, 2017, Keep Our Wells Clean, Gail Salomon, Eugenia Grace Navitski, Vlad Eric Navitski, Thomas Diorio, Lynn Taylor-Miller, Charlie Miller, and Virginia Weeks (collectively, "Appellants"), filed a timely appeal of the Secretary's Order with the EAB pursuant to 7 Del. C. § 6008. On March 12, 2019, the Board conducted a public hearing and voted to dismiss the appeal and affirm the Secretary's Order. The EAB Order is the Board's written decision.

Appellants filed a timely appeal of the EAB Order to the Superior Court. Without taking additional evidence and relying on the administrative record below, on March 19, 2020 the Superior Court issued the Decision affirming the EAB Order.

Appellants now appeal the EAB Order as affirmed by the Superior Court's decision.

SUMMARY OF ARGUMENT

1. The EAB erred as a matter of law and fact when it concluded that the 2014 Regulations did not apply to Artesian's application for, and DNREC's issuance of, the 2017 Permit. The 2014 Regulations superseded and replaced the regulations in effect at the time of an earlier 2013 Permit. Further, there is no substantial evidence in the record that DNREC applied the prior regulations to the 2017 Permit.

2. The EAB did not engage in a detailed analysis of what the 2014 Regulations require for the 2017 Permit. The Board's decision should be reversed and remanded for review of the Secretary's decision under the 2014 Regulations.

3. Section 6.3.1.14.1 of the 2014 Regulations does not authorize construction permit "amendments" but does require the submission of a "permit application" when changes are made to a permitted design.

4. Sections 6.1 and 6.5 of the 2014 Regulations apply to the 2017 Permit. Artesian had to "obtain a permit" (that is, written authorization from DNREC) to construct the 2017 changes it sought because the 2013 Permit did not provide such authorization. Section 6.5 prohibited DNREC from reviewing Artesian's 2017 permit application until a Hydrogeologic Suitability Report ("HSR") and Surface Water Assessment Report ("SWAR") had been approved by DNREC. Because no HSR or SWAR was submitted, DNREC violated § 6.5.

5. To the extent the 2014 Regulations are ambiguous, principles of regulatory construction support Appellant's interpretation that an HSR and SWAR were required under § 6.5. This interpretation harmonizes various regulatory provisions, avoids rendering regulatory language surplusage, and presents a reasonable result given the centrality of HSR and SWAR to the siting and design of a Large On-site Wastewater Treatment and Disposal System ("LOWTDS") like ANSRWRF under the Regulations. By contrast, an interpretation not requiring an HSR and SWAR causes disharmony, renders regulatory language meaningless, and produces an irrational result.

6. To the extent that there are factual issues left to resolve in the appeal, remand is necessary because the EAB prevented Appellants from completing their case-in-chief.

STATEMENT OF FACTS[1]

On October 15, 2013, DNREC issued Artesian a permit ("the 2013 Permit") authorizing the construction of Phase I of ANSRWRF. (A. 588-603). According to the 2013 Permit, Phase I of ANSRWRF would "treat domestic wastewater from the proposed Elizabethtown project northwest of the Town of Milton in Sussex County, Delaware" at a volume of 1 Million Gallons per Day ("MGD"). (A. 590).[2] The 2013 Permit required that ANSRWRF treat this domestic wastewater at an onsite treatment facility (*see id*.: "the facility will include Primary Screening, Grit Removal, Aeration Basins, Coagulation, Flocculation, Filtration, Disinfection and Treated Wastewater Storage") and then utilize it "for spray irrigation of privately owned agricultural land," *id*. Thus, the 2013 Permit allowed construction of a facility that: (1) accepts domestic wastewater, (2) to be treated by Artesian on-site, (3) at a volume of 1 MGD, (4) for spray irrigation.

In May 2017, Artesian sought DNREC's permission to change Phase I of ANSRWRF by filing an Application for a Permit to Construct a Wastewater

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[1] These Facts are drawn from a variety of sources that were exhibits before the Board and Superior Court and are set forth in the Appendix to this Brief. References to the Appendix pages shall be to "A. ___."

[2] According to DNREC regulations, "domestic" refers to waste "which normally originates in a private home or apartment house," and "wastewater" refers to "water carried waste from septic tanks, water closets, residences . . . ." 7 Del. Admin. C. 7101 § 2.0 (A. 625, 634). Thus, "domestic wastewater" would be water-carried wastes from residences. *See also* 3/12/19 Transcript 31 (A. 379) (testimony of Jack Hayes).

Treatment Spray Irrigation Facility. (A. 1-2). Its May 5, 2017 Amended Design Development Report ("DDR") submitted with the 2017 application described the new vision of ANSRWRF this way: "Phase 1 of the project is to construct a storage lagoon and disposal spray fields, and to accept treated wastewater effluent from Allen Harim Foods, LLC" with a "design average daily flow [of] 1.5 MGD with a peak flow of 2.0 MGD. The customers for Phase 1 consists of a single food processing source . . . ." (A. 7). Thus, what Artesian sought was a change to allow construction of a facility that would: (1) accept industrial (i.e., "food processing") wastewater from a single source (vs. domestic wastewater in the 2013 Permit), (2) which is treated at Allen-Harim Foods (vs. on-site treatment by Artesian in the 2013 Permit), (3) at a volume of 1.5 – 2.0 MGD (vs. 1 MGD in the 2013 Permit), (4) for spray irrigation.

Between the issuance of the 2013 Permit and submission of Artesian's May 2017 permit application, the regulations governing On-Site Wastewater Treatment and Disposal Systems utilizing spray irrigation changed. In January 2014, DNREC issued revised regulations now found at 7 Del. Admin. C. 7101 ("2014 Regulations").[3] In its DDR, Artesian initially claimed that its proposed change to Phase I was not governed by the new 2014 Regulations, but rather by the regulations

[3] For the Court's convenience, the 2014 Regulations are in the Appendix at A. 622-741. Appellants will provide Appendix citations along with section citations.

in effect at the time of the issuance of the 2013 Permit: "while this project is governed by the 1999 Regulations, the Amended DDR has been prepared adopting improved methodologies described in the 2014 regulations where feasible." (A. 7). DNREC, however, rejected Artesian's claim and specifically insisted that the 2014 Regulations apply:

> The DDR states on page 5 that the project is governed by the 1999 *Guidance and Regulations Governing the Land Treatment of Wastes*. The 1999 Land Treatment Regulations were superseded by the 2014 amended State of Delaware, Department of Natural Resources and Environmental Control, Regulations Governing the Design, Installation and Operation of On-Site Wastewater Treatment and Disposal Systems (Regulations). Therefore, the project is governed by the 2014 Regulations.

June 27, 2017 Memorandum by Marlene Baust, P.E. at 2 (A. 50).[4] In its August 18, 2017 Amended Design Development Report Addendum 1 at page 3, Artesian responded to DNREC's comments by adopting word-for-word the language from Ms. Baust's memo quoted above. (A. 57). The Secretary's Order indicates that Artesian's request was reviewed under the currently existing (i.e., 2014) regulations. *See* Secretary's Order at 4 (A. 71) ("The Department reviews the Application pursuant to its Regulations governing the Design, Installation and Operation of On-Site Wastewater Treatment and Disposal Systems, 7 Del. Admin. Code 7101

[4] Ms. Baust's Memo goes on to state immediately after the language quoted above: "Section 1.3 of the 2014 Regulations states 'These Regulations shall supersede and replace the Regulations Governing the Design, Installation, and Operation of On-Site Wastewater Treatment and Disposal Systems and the Guidance and Regulations Governing the Land Treatment of Wastes, Part II.'" (A. 50).

('Regulation 7101')"). The Hearing Officer's Report—attached to the Secretary's Order and adopted by the Secretary, *see* Secretary's Order at 12 ¶ 5 (A. 78)—expressly found that DNREC reviewed the application under the 2014 Regulations "as opposed to the Department's regulations in effect when the Department issued the 2013 Construction Permit." H.O. Report at 12 (A. 91).

On November 2, 2017, the Secretary's Order granted Artesian what it called an amendment to the 2013 Permit to allow the construction of the new ANSRWRF Phase I proposed in the DDR. (A. 68-124). As noted above, the Secretary's Order indicates that review of Artesian's request was done under the currently existing (i.e., 2014) Regulations; nowhere does it state or find that a permit amendment is subject to the regulations that were in effect at the time of the initial permit application unless the changes were significant.

Appellants appealed the Secretary's Order to the EAB. (A. 125-130). The appeal included the claim that Artesian failed to submit the HSR required by Section 6.2.3 of the 2014 Regulations, 7 Del. Admin. Code 7101 § 6.2.3, and the SWAR required by Section 6.2.4 of the 2014 Regulations, 7 Del. Admin. Code 7101 § 6.2.4.[5]

[5] The 2014 Regulations set forth extensive, specific requirements on what must be in an HSR (*see* 7 Del. Admin. Code 7101 § 6.2.3, A. 691-695) and SWAR (*see* 7 Del. Admin. Code 7101 § 6.2.4, A. 695-696). Among the many requirements for an HSR is that, for spray irrigation systems, there be a minimum of one 20-foot deep soil boring per 10 acres of disposal area (*see* § 6.2.3.4.2.1.5, A. 692). SWARs are

The Board conducted two hearings on Appellants' appeal. The first, on May 22, 2018, focused solely on DNREC's and Artesian's Motions to Dismiss and Motions *in Limine*. After hearing arguments, the Board denied the Motions to Dismiss for lack of standing, 5/22/18 Transcript at 110-111 (A. 241-242), and granted the Motions *in Limine* "such that evidence presented must be limited to evidence before the Secretary that speaks to proper site selection and system design and not the operations of the plant." 5/22/18 Transcript at 167-168 (A. 298-299). During argument, DNREC's counsel took the position that "the 2014 amendments to the regulations do not apply to open permits at the time the regulations were adopted . . . the regulations do not require that the 2014 regulations be applied to [permit] amendments." 5/22/18 Transcript at 65 (A. 196).

The second hearing—on the merits—took place March 12, 2019. Appellants called Jack Hayes, DNREC's Program Manager for the Large Systems Branch of the Groundwater Discharges section, who was involved in DNREC's review of Artesian's 2017 application and signed the 2017 Permit on behalf of DNREC. 3/12/19 Transcript at 28-29 (A. 376-377). Mr. Hayes testified that no HSR was submitted with Artesian's application for the 2017 Permit, *id*. at 63 (A. 411), and that DNREC believed that data submitted in connection with the 2013 permit was

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required to demonstrate compliance with nitrogen performance criteria in each disposal field (*see* 7101 § 6.2.4.5, A. 696).

sufficient to provide the information an HSR would provide. *Id*. Mr. Hayes testified, however, that the 2014 HSR regulatory requirement of one test boring for every 10 acres of spray area was not satisfied by the prior data, *id*. at 63-65 (A. 411-413).[6] Mr. Hayes also testified that no SWAR was submitted in connection with Artesian's 2017 application, *id*. at 66 (A. 414), and the 2014 regulatory requirement for demonstrating applicable performance standards for nitrogen were only supplied for Field G, one of the four fields on which spray irrigation would be allowed under the 2017 Permit. *Id*. at 67-70 (A. 415-418). On examination by DNREC counsel, Mr. Hayes testified as follows:

> Q. And the first area I would like to address really is which regulations were applied to amendment of the 2013 permit.
>
> A. The 2014 regulations were applied.

Id. at 72 (A. 420). On examination by Board member LaRocca, Mr. Hayes testified that "[t]he requirement for HSR and SWAR were part of the 2014 regulations. They were not part of the land treatment of waste regulations from 1999" and that the requirement of a SWAR was "brand new with the 2014 regulations." *Id*. at 109-110 (A. 457-458).

The second witness to testify was Christopher Grobbell, Appellants' expert in hydrology, hydrogeology, and fate and transport of pollutants. 3/12/19 Transcript

[6] In fact, Mr. Hayes testified that there was a total of 13 borings done over 1652 acres of spray area. 3/12/19 Transcript at 35 (A. 413).

111-120 (A. 459-468). During the middle (i.e., before completion) of Mr. Grobbell's testimony, Artesian objected, *id*. at 133-134 (A. 481-482), and Appellants' counsel explained that Mr. Grobbell was testifying in response to Mr. Hayes' claim that DNREC had the information an HSR would provide, *id*. at 135 (A. 483). DNREC moved "for a directed verdict on the argument that an HSR, SWAR, and the other requirements of Section 6.2 were required for this 2013 permit amendment application." *Id*. at 141 (A. 489). The Board then stopped the proceeding before Appellants completed their case-in-chief to go into executive session "to address the matter at hand," *id*. at 143 (A. 491), and then asked for "legal argument only on the first three issues raised in this appeal." *Id*. at 145, A. 493. The Board heard oral argument, *id*. at 145-175 (A. 493-523), went back into executive session, *id*. at 175 (A. 523), and then returned to vote 6-0 to "affirm the Secretary's order." *Id*. at 176-77 (A. 524-525).

The EAB Order, though 12 pages long, contains only slightly more than 1 page of "Legal Conclusions." On the issues relevant to this appeal, the Board's analysis consists of the following:

> The Board agrees with DNREC and Artesian's contention that, as a matter of law, the 2014 regulations do not apply to the amendment to the existing construction permit. DNREC concluded that a permit amendment is subject to the regulations that were in effect at the time of the initial permit application unless the changes were significant. In this case DNREC determined that the changes are not significant enough to require the applicant to submit a new permit application. DNREC's determination is not unreasonable or clearly wrong.

> The Board agrees with Artesian's contention, and finds as a matter of law2, that it submitted the required plans, specifications and design engineer report contemplated by subsection 6.3.1.14 . . . .

EAB Order at 12 (A. 579). The Board therefore affirmed the Secretary's decision. *Id*.

Appellants appealed the EAB Order to the Superior Court, which took no additional evidence but relied on the administrative record below and the arguments of the parties. On March 19, 2020, the Court issued the Decision. The Superior Court found that Artesian "did not submit an HSR or SWAR with its application for an amended construction permit on May 10, 2017," Decision at 6 (A. 747), and that DNREC knew it but believed that an HSR and SWAR would only be required with a "*new* application." *Id*. at 7 (A. 748) (emphasis in original). The Court stated that "[t]he difficult task in this case is to determine if DNREC correctly processed amendments to a 2013 construction permit that was approved under the 1999 Regulations where those amendments are now governed by – at least to some extent – the 2014 Regulations." *Id*. at 12-13 (A. 753-54). Stating that "[t]he 2014 Regulations do not, in my view, address the situation with the clarity required," *id*. at 13 (A. 754), the Court focused on three sections of the 2014 Regulations: §§ 6.1, 6.5, and 6.3.1.14.1. *Id*. at 13-14 (A. 754-55).

The Superior Court found that §§ 6.1 and 6.5 "by their clear language do not apply" because Artesian had already "obtained" a construction permit (i.e., the 2013

Permit), and that, because they do not apply, "then the obligations to submit an HSR and a SWAR do not apply either." *Id*. at 17 (A. 758). While finding that § 6.3.1.14.1, "by its clear language, allows Artesian to seek an amendment to its existing construction permit," it also found that "[u]nfortunately, the 2014 Regulations do not define or address what a 'change' either means or, more importantly, what Artesian has to do in order to obtain the necessary DNREC approval." *Id*. at 19 (A. 760). The Court then found that the conclusion of the Secretary and EAB "that the 2014 Regulations did not require Artesian to submit a HSR and SWAR with its application for an amended construction permit because the changes that Artesian wanted to make to ANSRWRF were not substantial enough to require Artesian to conduct additional hydrogeologic and soil studies" was "a correct statement of the applicable law and is supported by substantial evidence in the record." *Id*. at 19-20 (A. 760-61). The Superior Court therefore affirmed the EAB Order. *Id*. at 24 (A. 765).

ARGUMENT

I. THE EAB ERRED WHEN IT FOUND THAT THE 2014 REGULATIONS DID NOT APPLY TO THE APPLICATION FOR AND ISSUANCE OF THE 2017 PERMIT.

Question Presented - Whether the EAB erred as a matter of law and fact when it held that the 2014 Regulations do not apply to the application for and issuance of the 2017 Permit?

Suggested Answer: Yes.

Standard of Review – "Where there is a review of an administrative decision by both an intermediate and a higher appellate court and the intermediate court received no evidence other than that presented to the administrative agency, the higher court does not review the decision of the intermediate court but, instead, directly examines the decision of the agency." *Prunckin v. Del. Dept. Health & Human Services*, 201 A.3d 525, 539 (Del. 2019); *Stoltz Management Co., Inc. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992). Thus, this Court reviews the EAB decision under the standard applicable to the Superior Court: "whether the decision is supported by substantial evidence and is free from legal error." *Dept. Natural Resources & Env. Control v. McGinnis Auto & Mobile Home Salvage, Inc.*, --- A.3d ---, 2020 WL 830058 at *3 (Del. February 20, 2020); *Prunckin*, 201 A.3d at 540; *Diamond Fuel Oil v. O'Neal*, 734 A.2d 1060, 1062 (Del. 1999); *Stoltz Management*, 616 A.2d at 1208. Reversal is warranted if the agency exercised its power arbitrarily, committed

error of law, or made factual findings which are unsupported by the substantial evidence. *Kreshtool v. Delmarva Power & Light Co*., 310 A.2d 649, 652 (Del. Super. 1973). When reviewing the conclusions of law made by an administrative agency like the Board, the Court's review is *de novo. Anchor Motor Freight Co. v. Ciabattoni*, 761 A.2d 154, 156 (Del. 1996).

Merits of Argument – The second paragraph of the EAB Order's Legal Conclusions states unequivocally: "The Board agrees with DNREC and Artesian's contention that, as a matter of law, the 2014 regulations do not apply to the amendment to the existing construction permit." EAB Order at 12 (A. 579). Further, the Board expressly stated that DNREC's determination "that a permit amendment is subject to the regulations that were in effect at the time of the initial permit application unless the changes were significant" was "not unreasonable or clearly wrong." *Id*. Although the Superior Court tries to explain this away in a footnote,[7] the language is clear: the Board concluded that, "as a matter of law," the 2014 Regulations did not apply to Artesian's application for, and DNREC's issuance of,

[7] The Superior Court—noting it was "not a model of clarity"—characterized the EAB Order as merely having "appeared" to state the 2014 Regulations did not apply. It stated that "the fairest view of the EAB's ruling" was that the EAB "found that the sections of the 2014 Regulations requiring a HSR and SWAR do not apply, that Artesian complied with Section 6.3.1.14.1, and that the changes that Artesian sought were not substantial enough to require further hydrogeologic and soil evaluations." Decision at 13 n. 11 (A. 754).

the 2017 Permit, and that the prior regulations controlled. The Board's conclusion was erroneous in both law and fact.

A. The Board Erred As A Matter Of Law Because The 2014 Regulations Expressly Supersede The Prior Regulations.

The Board's legal error is manifest from a review of the regulations in effect when Artesian submitted its permit application in 2017: the 2014 Regulations.

Section 1.2 of the 2014 Regulations states that these regulations "shall apply to all aspects of" the "planning, design, [and] construction . . . of on-site wastewater treatment and disposal systems within the boundaries of the State of Delaware." 7 Del. Admin. Code 7101 § 1.2.1 (A. 622-623). Section 1.3 then specifically states:

> These Regulations shall supersede and replace the Regulations Governing the Design, Installation and Operation of On-Site Wastewater Treatment and Disposal Systems and the Guidance and Regulations Governing the Land Treatment of Wastes, Part II.

7 Del. Admin. Code 7101 § 1.3 (A. 623). Delaware law applies similar principles of construction to statutes and regulations. S*ee Garrison v. Red Clay Consol. School Dist*., 3 A.3d 264, 267 (Del. 2010). As this Court said in *Garrison*, "The Court's goal, in construing statutes and regulations, is to ascertain and give effect to the intent of the legislative body." *Id*. When the language "is clear on its face and is fairly susceptible to only one reading, the unambiguous text will be construed accordingly." *Progressive Northern Ins. Co. v. Mohr*, 47 A.3d 492, 495 (Del. 2012).

Here, the 2014 Regulations are clear and unambiguous: they supersede and replace the old regulations that had been in effect when Artesian's 2013 Permit was issued.

Further, the 2014 Regulations contain no language allowing application of prior regulations to the amendment of a permit issued under those prior regulations. Because Artesian proposed what is a LOWTDS under the 2014 Regulations,[8] Section 6 of those Regulations applies. Section 6.3.1.14.1 provides that "[a] construction permit application, plans and specifications and design engineer report with applicable fees must be submitted to the Department if the construction permit has expired or changes have occurred," 7 Del. Admin. Code 7101 § 6.3.1.14.1 (A. 697). The Secretary specifically cited this section as "allow[ing] the Applicant [i.e., Artesian] to apply for a permit amendment because the 2013 Construction Permit remains in effect." Secretary's Order at 4 (A. 71). The language of § 6.3.1.14.1 does not recognize an exception to the 2014 Regulations requiring application of prior regulations for already-existing construction permits. Likewise, § 6.5.2 governs Large System Construction Permits, (A. 713-714); nothing in any of its subsections mandates application of the prior regulations for already-existing

[8] The 2014 Regulations defines LOWTDS as systems with a design flow of more than 2,500 gallons per day, *see* 7 Del. Admin. Code 7101 § 2.0 (A. 627); because Artesian proposed be handling 1-2 million gallons per day of Allen-Harim industrial wastewater, *see* Secretary's Order at 1-2(A. 68-69), Artesian's proposed system is a LOWTDS.

construction permits. In short, nothing in the 2014 Regulations creates an exception to the application of those regulations for amendments to already-existing permits.[9]

Quite simply, the 2014 Regulations specifically state they "supersede and replace" prior regulations—i.e., the regulations which existed at the time DNREC issued the 2013 Permit. Nothing in the 2014 Regulations recognizes an exception to the application of those regulations to amendments of already-existing permits. As such, there is no legal basis for the Board's conclusion that the 2014 Regulations do not apply to the 2017 Permit; the Board therefore erred as a matter of law.

B. The Board Erred As A Matter Of Fact In Justifying Its Conclusion By Reference To DNREC's And Artesian's "Arguments" And "Determinations."

The Board justified its conclusion that the 2014 Regulations do not apply by claiming that it was agreeing "with DNREC and Artesian's contention . . . that the 2014 regulations do not apply" and that DNREC had in fact "concluded that a permit amendment is subject to the regulations that were in effect at the time of the initial permit application unless the changes were significant." EAB Order at 12 (A. 579). These claims are not supported by substantial evidence in the record.

[9] Appellants could find only one instance in the 2014 Regulations in which a system "permitted prior to the promulgation of this regulation" is discussed: § 6.3.1.8 (A. 696), which imposes a 12-month "grace period" for bringing an already-permitted system into compliance with the 2014 Regulations' groundwater monitoring requirements. Even here, however, the Regulations do not mandate application of the prior regulations, but rather impose the 2014 Regulations requirements (albeit on a slightly different timetable).

As for DNREC, the record is clear that its Secretary and staff believed the 2014 Regulations **did** apply to Artesian's 2017 application. After Artesian claimed in its DDR that the project was "governed by the 1999 Regulations," DDR at 5 (A. 7), Marlene Baust—a DNREC staffer reviewing the application—disagreed, specifically citing the "supersede and replace" language of § 1.3 and insisting that "the project is governed by the 2014 Regulations," June 27, 2017 Memorandum at 2 (A. 50). The Secretary's Order makes clear that DNREC's decision was made under the 2014 Regulations, Secretary's Order at 4 (A. 71), and the Hearing Officer's Report expressly found that DNREC reviewed the application under the 2014 Regulations "as opposed to the Department's regulations in effect when the Department issued the 2013 Construction Permit." H.O. Report at 12 (A. 91). While DNREC's counsel did argue before the EAB that "the 2014 amendments to the regulations do not apply to open permits at the time the regulations were adopted . . . the regulations do not require that the 2014 regulations be applied to [permit] amendments," 5/22/18 Transcript at 65 (A. 196),[10] DNREC's own witness contradicted that position. When questioned by DNREC's counsel, Jack Hayes—who signed the 2017 Permit on behalf of DNREC—testified:

[10] Appellants note the extraordinary nature of this claim: in arguing that the 2014 Regulations did not apply, DNREC's counsel was asserting that both the Secretary and the Hearing Officer ***were wrong on the law***.

Q. And the first area I would like to address really is which regulations were applied to amendment of the 2013 permit.

A. The 2014 regulations were applied.

3/12/19 Transcript at 72 (A. 420). Thus, while DNREC's counsel contended the 2014 Regulations did not apply, everyone else within DNREC thought and acted like they did apply. There is no evidence in the record that DNREC permit decision makers either believed the 2014 Regulations did not apply or determined that the old regulations apply unless the changes are significant. If anything, **the entire factual record before the Board shows DNREC did the exact opposite of what the Board claimed it did.**

As to Artesian, after Ms. Baust rejected the claim that the 1999 Regulations governed the project, Artesian changed its tune and agreed that the 2014 Regulations applied. *See* August 8, 2017 Amended Design Development Report Addendum 1 at page 3 (A. 57). Having done so, Artesian gained the benefit of the 2017 Permit issuance, and thus was barred by the doctrine of quasi-estoppel from claiming otherwise. *See Albertson v. Winner Automotive*, 2004 WL 2435290 at *4 (D. Del. October 27, 2004) ("The doctrine of quasi-estoppel precludes a party from asserting, to another's disadvantage, a right inconsistent with a position it has previously taken. Quasi-estoppel applies when it would be unconscionable to allow a person "to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit," quoting *Bott v. J.F. Shea Co., Inc.*, 299 F.3d 508, 512 (5th

Cir.2002)); *Personnel Decisions, Inc. v. Business Planning Systems, Inc.*, 2008 WL 1932404 at *6 (Del. Ch. May 5, 2008) (same). There is simply no evidence in the record that Artesian contended before the Board that the 2014 Regulations did not apply.

Thus, the Board's claims of DNREC's and Artesian's arguments that the 2014 Regulations do not apply, or that DNREC determined the 1999 Regulations apply unless there are substantial changes, are not supported by substantial evidence in the record. The Board's conclusion that the 2014 Regulations do not apply is therefore both legally and factually in error and should be reversed.

II. THE EAB ERRED WHEN IT "HELD" THAT THE 2014 REGULATIONS DID NOT REQUIRE AN HSR AND SWAR BE PREPARED BEFORE DNREC CONSIDERED ARTESIAN'S 2017 PERMIT AMENDMENT APPLICATION.

Question Presented – Did the EAB err as a matter of law when it "held" that the 2014 regulations did not require Artesian to submit, and DNREC to approve, an HSR and SWAR before issuance of the 2017 Permit?

Suggested Answer: Yes.

Standard of Review – The standard of review for this argument is the same as for the first argument above: this Court reviews the EAB decision to determine "whether the decision is supported by substantial evidence and is free from legal error." *Dept. Natural Resources & Env. Control v. McGinnis Auto & Mobile Home Salvage, Inc.*, --- A.3d ---, 2020 WL 830058 at *3 (Del. February 20, 2020); *Prunckin*, 201 A.3d at 540; *Diamond Fuel Oil v. O'Neal*, 734 A.2d 1060, 1062 (Del. 1999); *Stoltz Management*, 616 A.2d at 1208. Reversal is warranted if the agency exercised its power arbitrarily, committed error of law, or made factual findings which are unsupported by the substantial evidence. *Kreshtool v. Delmarva Power & Light Co*., 310 A.2d 649, 652 (Del. Super. 1973). When reviewing the conclusions of law made by an administrative agency like the Board, the Court's review is *de novo. Anchor Motor Freight Co. v. Ciabattoni*, 761 A.2d 154, 156 (Del. 1996).

Merits of Argument - Having reached the erroneous legal conclusion that the 2014 Regulations did not apply to the 2017 Permit, the EAB Order presents no real

discussion of what the 2014 Regulations would require. While the Superior Court offered as its "fairest view of the EAB's ruling" that the EAB "found that the sections of the 2014 Regulations requiring a HSR and SWAR do not apply, that Artesian complied with Section 6.3.1.14.1, and that the changes that Artesian sought were not substantial enough to require further hydrogeologic and soil evaluations," Decision at 13 n.11 (A. 754), nothing in the EAB Order shows any real Board analysis of either these issues or §§ 6.1 and 6.5 as discussed in the Decision.[11] When a board does not develop an analysis sufficient for the Court to review, the proper remedy is to reverse the Board's decision and remand it back to the Board for review of the Secretary's decision under the 2014 Regulations. *See Pepsi Bottling Group, Inc. v. Meadow*, 2009 WL 3532274 (Del. Super. August 28, 2009) ("Where an administrative body has failed to develop a complete record sufficient for this Court's review, the Court 'shall remand the case to the agency for further proceedings on the record'," *quoting* 29 Del. C. 10142(c)).

Nevertheless, the Superior Court offered a detailed analysis of the 2014 Regulations that it viewed as implicit in the EAB Order. Assuming (as the Superior

[11] The Legal Conclusions section does contain a statement that Artesian "submitted the required plan, specifications and design engineered report contemplated by subsection 6.3.1.1.14," EAB Order at 12 (A. 579)—what the Superior Court calls a "typographical error" meant to reference § 6.3.1.14.1. Decision at 13 n.11 (A. 754).

Court did) that the EAB in fact engaged in that analysis, a close review of the 2014 Regulations indicates that the implicit analysis is legally flawed.

Precisely because this review requires application and interpretation of the 2014 Regulations, Appellants restate the principles of regulatory interpretation. As this Court said in *Garrison*, "The Court's goal, in construing statutes and regulations, is to ascertain and give effect to the intent of the legislative body." 3 A.3d at 267. When the language "is clear on its face and is fairly susceptible to only one reading, the unambiguous text will be construed accordingly." *Progressive Northern Ins. Co. v. Mohr*, 47 A.3d 492, 495 (Del. 2012). However,

> If the regulation is ambiguous, settled rules of statutory construction guide the Court:
>
> > Each part or section of the regulation should be read in light of every other part or section to produce an harmonious whole. Undefined words must be given their ordinary, common meaning. Additionally, words in a regulation should not be construed as surplusage if there is a reasonable construction which will give them meaning, and courts must ascribe a purpose to the use of regulatory language, if reasonably possible.

Garrison, 3 A.3d at 267. Finally, when a provision appears in one part of a statute or regulation but not in another, one presumes the omission was intended. *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982). The Superior Court articulated similar principles. *See* Decision at 11-12 (A. 752-53).

A. General Regulatory Framework And Background

To understand the regulatory interpretation required in this appeal, it helps to set the legal and factual stage. ANSRWRF is a LOWTDS under the 2014 Regulations. *See* Secretary's Order at 4 (A. 71). LOWTDS—especially spray irrigation LOWTDS like ANSRWRF—need permits because 7 Del. C. § 6003(a)(2) provides that "No person shall, without first having obtained a permit from the Secretary, undertake any activity . . . In a way which may cause or contribute to discharge of a pollutant into any surface or ground water . . . ." While the statute itself does not define what a "permit" is, the 2014 Regulations do: "'Permit' means the written document approved by the Department which authorizes the installation of a system or any part thereof, which may also require operation and maintenance of the system." 7 Del. Admin. Code 7101 § 2.0 (A. 629).

The 2014 Regulations draw a distinction between LOWTDS *construction* and *operating* permits. *See* 7 Del. Admin. Code 7101 §§ 6.5.1, 6.5.2 (regulations concerning construction permits); § 6.5.3 (regulations concerning operating permits). As the names suggest, construction permits govern the construction of a LOWTDS, while operating permits—which can only be obtained "upon completion of construction," § 6.5.3—govern the operation of the constructed LOWTDS.

The 2013 Permit issued to Artesian was a construction permit. *See* 2013 Permit at 1 (A. 588) and 6 (A. 593). It was, in the regulatory parlance, a "written

document approved by" DNREC that "authorized" Artesian to construct a facility that: (1) accepts domestic wastewater from the Elizabethtown development near Milton, DE, (2) to be treated by Artesian on-site, (3) at a volume of 1 MGD, (4) for spray irrigation. 2013 Permit at 3 (A.590).

By 2017, Artesian decided that it wanted to alter ANSRWRF's Phase I so that it could handle process wastewater from, and treated by, Allen Harim's Harbeson chicken processing facility. *See* DDR at § 3.1 (A. 7). Thus, Artesian sought approval for a change to ANSRWRF's Phase I to allow construction of a facility markedly different from that authorized in the 2013 Permit. This 2017 version of Phase I would involve a facility that would: (1) accept industrial (i.e., "food processing") wastewater from a single source (vs. domestic wastewater from houses in Elizabethtown in the 2013 Permit), (2) such wastewater would be treated at Allen-Harim Foods (vs. on-site treatment by Artesian in the 2013 Permit), (3) at a volume of 1.5 – 2.0 MGD (vs. 1 MGD in the 2013 Permit), (4) for disposal via spray irrigation. To obtain DNREC's authorization to make these changes to ANSRWRF's Phase I, Artesian submitted its "Application for A Permit to Construct A Wastewater Treatment Spray Irrigation Facility" (A. 1-2), as well its DDR (A. 3-48), but did not submit an HSR or SWAR. DNREC processed Artesian's application and ultimately issued the 2017 Permit (A. 604-621).

The main issue before the EAB was whether the 2014 Regulations required Artesian to submit an HSR and SWAR. The Superior Court, in affirming the EAB, boiled the analysis down to the application of three sections of the 2014 Regulations: §§ 6.1, 6.5, and 6.3.1.14.1. Decision at 13-14 (A. 754-55). It found that §§ 6.1 and 6.5 "by their clear language do not apply" because Artesian had already "obtained" a construction permit (i.e., the 2013 Permit), and that, because they do not apply, "then the obligations to submit an HSR and a SWAR do not apply either." *Id*. at 17 (A. 758). While finding that § 6.3.1.14.1, "by its clear language, allows Artesian to seek an amendment to its existing construction permit," it also found that "[u]nfortunately, the 2014 Regulations do not define or address what a 'change' either means or, more importantly, what Artesian has to do in order to obtain the necessary DNREC approval." *Id*. at 19 (A. 760). The Court then found the conclusion of the Secretary and EAB "that the 2014 Regulations did not require Artesian to submit a HSR and SWAR with its application for an amended construction permit because the changes that Artesian wanted to make to ANSRWRF were not substantial enough to require Artesian to conduct additional hydrogeologic and soil studies" was "a correct statement of the applicable law and is supported by substantial evidence in the record." *Id*. at 19-20 (A. 760-61).

Appellants respectfully suggest that the Board (to the extent it actually reached these conclusions) and the Superior Court erred as a matter of law.

B. § 6.3.1.14.1 Does Not Authorize Permit Amendments But Rather Requires A Permit Application.

Both the Secretary (Secretary's Order at 4 (A. 71)) and the Superior Court (Decision at 19 (A. 760)) concluded that § 6.3.1.14.1 allows for Artesian to obtain an "amendment" of its 2013 Permit—the Superior Court saying it does so "by its clear language." In fact, § 6.3.1.14.1 says nothing about *amending* a permit. Instead, it states:

> A construction permit application, plans and specifications and design engineer report with applicable fees must be submitted to the Department if the construction permit has expired or changes have occurred.

7 Del. Admin. Code 7101 § 6.3.1.14.1. The lack of any reference to "amending" a permit in this "clear language" about *construction* permits stands in stark contrast to the 2014 Regulations' provision concerning *operating* permits. Section 6.5.3.3.1—part of § 6.5.3 governing Large System Operating Permits—states: "In consultation with the permittee, the Department may modify or amend an existing [operating] permit provided that the modifications would not result in an increased impact or risk to the environment or to public health." (A. 717). In effect, the 2014 Regulations expressly recognize the ability of an permit holder to seek an amendment of an *Operating Permit*, while it says nothing about the ability to amend a *Construction Permit* (the type of Permit at issue in this appeal). Under accepted principles of regulatory construction, such express recognition of *operating* permit amendments, coupled with no such express recognition for *construction*

amendments, means no amendments of construction permits are intended or allowed.

Nor is there any support in the language of § 6.3.1.14.1 for the erroneous interpretations by the Board and Superior Court that the section imposes some "significant" or "substantial" "changes" threshold that affects interpretation of the Regulations. For the Board, whether the changes from the 2013 Permit proposed in the 2017 application were significant determines which set of regulations apply.[12] For the Superior Court, whether the changes were "substantial enough" determined whether additional studies were necessary. Decision at 19-20 (A. 760-61). However, nothing in the language of § 6.3.1.14.1 supports either of these interpretations. At best, the "changes have occurred" language implies that it is possible some minor changes (say, changing a single pipe) might not trigger the requirements of § 6.3.1.14.1. Here, the line was most definitely crossed, as both Artesian and DNREC thought that, and acted like, the 2017 changes were significant enough to trigger the requirements of § 6.3.1.14.1. Once § 6.3.1.14.1 is triggered, however, the 2014 Regulations assign no role to the "significance" of the changes

[12] "DNREC concluded that a permit amendment is subject to the regulations that were in effect at the time of the initial permit application unless the changes were significant. In this case DNREC determined that the changes are not significant enough to require the applicant to submit a new permit application. DNREC's determination is not unreasonable or clearly wrong." EAB Order at 12 (A. 579).

proposed; instead, DNREC must process the permit application submitted. The Board and Superior Court erred in finding otherwise.

What the "clear language" of § 6.3.1.14.1 requires is that, when "changes have occurred," a construction permittee must submit "a construction permit application." That is exactly what Artesian did. (A. 1-2). The question is what the 2014 Regulations require DNREC to do once it receives a "permit application."

C. § 6.1 and 6.5 Apply To The 2017 Permit, And 6.5 Requires An Approved HSR And SWAR Before DNREC Can Review A Permit Application.

Sections 6.1 and 6.5 of the 2014 Regulations are the other sections identified by the Superior Court. Section 6.1 states in pertinent part: "A permit must be obtained from the Department prior to the construction, operation, maintenance or repair of any on-site wastewater treatment and disposal systems with daily design flow rates of ≥ 2,500 gallons." Section 6.5 states:

> Large System Permitting.
>
> In order to obtain a permit to construct and operate an on-site wastewater treatment and disposal system with daily flow rates of > 2,500 gallons, a permit application must be submitted to the Department for review and approval. *A permit application will not be reviewed by the Department until the SIR, HSR, and SWAR have been reviewed and approved by the Department*.

7 Del. Admin. Code 7101 § 6.5 (A. 709) (emphasis added). By its "clear language," § 6.5 prohibits DNREC from reviewing a "permit application" for a LOWTDS until an HSR and SWAR have been reviewed and approved by DNREC. Appellants

position here is simple: § 6.3.1.14.1 required the submission of a "permit application" because (as Artesian's and DNREC's actions admit) "changes had occurred" in the ANSRWRF Phase I design. Section 6.5 required DNREC to have an approved HSR and SWAR before it could review Artesian's permit application, but no such HSR or SWAR had been performed, submitted, or approved. Thus, when DNREC reviewed Artesian's "permit application" despite the absence of an approved HSR and SWAR, it acted contrary to the law specified in § 6.5. By affirming the Secretary's Order approving the issuance of the 2017 Permit despite this failure to comply with § 6.5, the EAB also acted contrary to law.

The Superior Court claimed that §§ 6.1 and 6.5 do not apply here, but that claim relies upon a misapplication of the 2014 Regulations. Pointing to the "obtain a permit" language in both sections, the Superior Court held the sections did not apply because Artesian had already "obtained" the 2013 Permit. Decision at 17 (A. 758). However, the 2014 Regulations define "permit" as written approval by DNREC authorizing a particular system's installation (or construction) and operation. 7 Del. Admin. Code 7101 § 2.0 (A. 629). What the 2013 Permit authorized was Artesian building a treatment plant to handle domestic wastewater from the homes of Elizabethtown. It did *not* authorize the handling of industrial, food-processing wastewater from Allen Harim's chicken processing operation, with treatment by Allen Harim and not Artesian, at a volume 50-100% higher than

contemplated in the 2013 Permit. Indeed, if it did, then Artesian did not have to apply for, and DNREC did not have to issue, the 2017 Permit. Once Artesian "made changes" to its 2013 version of ANSRWRF's Phase I, it needed to obtain DNREC's approval to construct a system different from that approved in the 2013 Permit. In the language of the 2014 Regulations, Artesian had to "obtain a permit" (that is, a written document issued by DNREC authorizing it) "to install" (i.e., construct) its 2017 version of ANSRWRF Phase I. Thus, DNREC's authorization in the 2013 Permit did not remove or render irrelevant the need to obtain another authorization (i.e., permit) in the 2017 Permit. Artesian applied for a "*permit*,"[13] and DNREC issued a "Spray Irrigation Construction *Permit*." (A. 604) (emphasis supplied). The Superior Court's claim that §§ 6.1 and 6.5 do not apply is simply wrong given the application of the "clear language" of the 2014 Regulations.[14]

A different way of characterizing the Superior Court's analysis is that §§ 6.1 and 6.5 only apply to "new" and not "existing" systems or permits, but that is equally unavailing. The language of neither section draws a distinction between "new" and "existing" or "amended" permits or systems, nor does the language exempt

[13] This is obvious not only from the title of the document ("Application for a *Permit*" (A. 1) (emphasis supplied), but also from its ¶ 5, which invokes the public notice requirements of 7 Del. C. § 6004 that apply to "a permit required by [7 Del. C.] § 6003."

[14] Further, given that the Superior Court's conclusion that "the obligations to submit an HSR and a SWAR do not apply" hinges on the non-applicability of §§ 6.1 and 6.5, Decision at 17 (A. 758), that conclusion falls as well.

"existing" systems or permits from its requirements. In fact, when the 2014 Regulations want to call out different treatment for "new" or "existing" systems or facilities, it explicitly does so. The 2014 Regulations define "existing on site wastewater treatment and disposal system" and "new system," 7 Del. Admin. Code § 2.0 (A. 626, 628), and proceeds to use those terms 13 different times.[15] Under principles of regulatory construction, when language is used in one section but not in another, one presumes the omission was intended. *Giuricich,* 449 A.2d at 238. In this case, the lack of any distinction between different types of permits or systems in § 6.5 means it applies to *any* permit application—not merely those for "new" systems that do not already have a permit.

Because § 6.5 applies, the mandatory obligation of its last sentence—prohibiting DNREC from reviewing Artesian's application until there is an approved HSR and SWAR—applies with full force. Delaware law holds that "once an agency adopts regulations governing how it handles its procedures, the agency must follow them. If the agency does not, then the action taken by the agency is invalid." *Hanson v. Delaware State Public Integrity Com'n*, 2012 WL 3860732 (Super. Ct. Aug. 30, 2012), *citing Dugan v. Delaware Harness Racing Commission,* 752 A.2d 529

[15] *See* §§ 2.0 (definitions of "repair" and "replacement system" (A. 630)); § 3.1.7 (A. 635); 3.22.1 (A. 636); 3.30 (A. 636); 3.31.7 (A. 637); 3.31.16 (A.638); 4.1.8 (A. 640); 4.8.1 (A. 640); 4.8.2 (A. 641); 6.3.1.7 (A. 696); 6.5.1.4.1.5 (A. 710); 6.8.4.2 (A. 731).

(Del.2000); *Mumford & Miller Concrete, Inc. v. Dept of Labor*, 2011 WL 2083940 at *6 (Super. Ct. April 19, 2011) (same). This mandatory language contrasts with numerous other sections giving DNREC discretion.[16] Again, principles of statutory and regulatory interpretation establish that, given the express granting of discretion elsewhere, the lack of language granting DNREC discretion in § 6.5 means that the Regulation's drafters intended DNREC would have no discretion to review an application without an HSR and SWAR. Nor does general deference that might be afforded DNREC allow it to alter the express meaning of § 6.5. As this Court said in *Garrison*, "[d]eference to an administrative agency's interpretation of its regulations cannot go so far as to authorize a regulation other than the one that was duly adopted." 3 A.3d at 269. In short, DNREC cannot "interpret" its way out of the clear language of § 6.5.

What DNREC should have done (but did not) was require Artesian to submit an HSR and SWAR. Those documents play a central role in the 2014 Regulations. The 2014 Regulations' Foreword explains that, despite statewide regulations since 1968, problems with systems permitted under prior regulations (such as

[16] *See e.g.*, 7 Del. Admin. C. 7101 §§ 6.3.1.2 (A. 696) (DNREC "may require" a meeting prior to construction); 6.3.2.2.1.8 – 6.3.2.2.1.11 (A. 698) (granting DNREC power to approve variations in vegetation); 6.3.2.3.13.12 (A. 704) (giving DNREC discretion to vary monitoring of surface water bodies); 6.5.1.5.2.1 and 6.5.1.5.3.1 (A.712) (allowing DNREC ability to approve use of an alternative scale for the topographic maps).

contamination of the State's groundwater) prompted revision of the regulations "governing the site evaluation, siting density, installation, operation and maintenance" of treatment systems (A. 622). The Foreword goes on to specify that

> The proper siting of wastewater treatment and disposal systems is addressed by various soil criteria and hydrogeologic criteria which lead to the selection of the most suitable [LOWTDS] for local conditions. System selection and sizing are determined by using the results of site-specific soil evaluations, infiltrometer tests and/or hydrogeologic suitability investigations.

Id. In other words, things like HSRs are viewed as fixing the inadequacy of site selection under prior regulatory regimes. This importance is further underscored by § 6.3.1.3, which requires that "[p]ermit applications must demonstrate the system is designed in accordance with the prescribed system type and design considerations as specified in the approved SIR, HSR, and SWAR for that parcel." That is why § 6.2.3 requires that an HSR, and § 6.2.4 likewise requires that a SWAR, "must be submitted to the Department for review and approval:" the 2014 Regulations envision the HSR and SWAR as driving the design of the system being constructed under a construction permit.

Contrary to the Superior Court's intimation, *see* Decision at 13 (A. 754), Appellants' interpretation of § 6.5 does not require a permittee submitting a permit application under § 6.3.1.14.1 to "start all over" and submit every document required of an applicant just starting out, or submit an HSR and SWAR every time a "change" occurs triggering § 6.3.1.14.1. All § 6.5 requires is a "permit application" and an

approved Soil Investigation Report (SIR), HSR, and SWAR. For most applicants who originally obtained their construction permits under the 2014 Regulations, the SIR, HSR, and SWAR would already exist and have been approved by DNREC prior to the time § 6.3.1.14.1 triggered. For permittees like Artesian who may have originally obtained a permit prior to the 2014 Regulations, all § 6.5 requires is that there be an HSR and SWAR in order to meet the Regulations' goal of improving site selection to what DNREC determined was the minimum level necessary to minimize environmental impacts from LOWTDS. If the permittee has not yet submitted an HSR or SWAR, then it must do so because § 6.5 prohibits DNREC from even considering the application until approved HSR and SWAR documents exist. Having submitted and obtained approval of an HSR and SWAR, the permittee need not submit one again. Given the central role of the HSR and SWAR in the scheme envisioned by the 2014 Regulations, that interpretation is reasonable and required by the "clear language" of § 6.5.

D. Any Ambiguity In The 2014 Regulations Should Be Resolved In Favor Of Requiring An HSR And SWAR.

While claiming to rely upon the "clear language" of the 2014 Regulations, the Superior Court stated that "[t]he 2014 Regulations do not, in my view, address this situation with the clarity that is required." Decision at 13 (A. 754). To the extent the Court thus found an ambiguity, then the rules governing interpreting ambiguous regulations come into play. As this Court has stated:

If the regulation is ambiguous, settled rules of statutory construction guide the Court:

> Each part or section of the regulation should be read in light of every other part or section to produce an harmonious whole. Undefined words must be given their ordinary, common meaning. Additionally, words in a regulation should not be construed as surplusage if there is a reasonable construction which will give them meaning, and courts must ascribe a purpose to the use of regulatory language, if reasonably possible.

Garrison, 3 A.3d at 267. An additional rule—what this Court has called the "golden rule of statutory interpretation"—is "that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another that would produce a reasonable result." *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1247 (Del. 1985). Application of these rules leads to the inevitable conclusion that an HSR and SWAR were required before DNREC considered the 2017 application.

First, an interpretation of §§ 6.1, 6.3.1.14.1, and 6.5 as requiring that there be an HSR and SWAR before DNREC considers a permit application submitted pursuant to § 6.3.1.14.1 harmonizes § 6.5 with the definition of "permit" in § 2.0 and with the centrality of the HSR and SWAR to system siting and design set forth in the Foreword and § 6.3.1.3. By contrast, the interpretation that an HSR and SWAR are not required for § 6.3.1.14.1 permit applications if there is some already-extant permit creates the unharmonious result of having two different sets of rules

and denies the design centrality of the HSR and SWAR for those already-extant permits.

Second, the interpretation that an HSR and SWAR are not required when the permittee seeks to make changes if it has already "obtained" some permit renders numerous provisions as surplusage. It reads out the language of § 6.1 that "[a] permit must be obtained from the Department prior to the construction . . . of **any** [LOWTDS] . . ." (emphasis supplied) by treating it as meaning permits must be obtained only for "**some**" LOWTDS (i.e., those without an already-existing permit). It renders the unqualified language of § 6.3.1.3—requiring without exception that "permit applications must demonstrate a system is designed . . . as specified in the approved SIR, HSR, and SWAR"—surplusage by exempting permit applications submitted under § 6.3.1.14.1 when there is an already-existing permit. In the same way, it renders the unqualified language of § 6.5 concerning DNREC not considering a "permit application" surplusage by creating an exception for applications under § 6.3.1.14.1 when there is an already-existing permit.

Finally, the *ala carte* approach to the 2014 Regulations exemplified by DNREC and the Superior Court (some sections apply, others do not) violates the golden rule of statutory interpretation. The most obvious example is in Ms Baust's June 27, 2017 Memo, where she sets forth a table (*see* A. 52-53) of 26 different provisions in § 6.3 of the 2014 Regulations covering a variety of different topics like

size of buffers, fencing, and leases of agricultural lands. Ms. Baust requires Artesian to "demonstrate how the proposed ANSRWRF meets the intent of" the regulations. Baust Memo at 4 (A. 52). Artesian then addressed each of the cited regulations. *See* August 2017 Amended Design Development Report Addendum at 3-12 (A. 57-66). Thus, DNREC insisted on compliance with § 6.3's design parameters. But arguing that an HSR and SWAR are not required ignores the unqualified requirement in § 6.3.1.3 permit applications must demonstrate compliance with the approved HSR and SWAR—something that did not happen here because there was no HSR or SWAR. Inexplicably, DNREC insists on applying § 6.3 requirements for fencing, but ignores § 6.3's requirements for using a central design-driving document. It is an unreasonable interpretation of the 2014 Regulations that DNREC may simply pick and choose which regulations will and will not apply to ANSRWRF—especially when the critical regulations (like §§ 6.3 and 6.5) do not give DNREC that discretion. Such unreasonable results should be rejected.[17]

To the extent that the 2014 Regulations are ambiguous in these circumstances, the more reasonable interpretation is that they require an approved HSR and SWAR before consideration of Artesian's 2017 permit application under § 6.3.1.14.1. This interpretation harmonizes the various provisions of the Regulations, avoids

[17] Likewise unreasonable in the interpretation adopted by the Superior Court (and allegedly the EAB) that the unqualified language of § 6.1 and 6.3.1.3 does not apply (i.e., is qualified) when dealing with already-extant permits.

rendering absolute language surplusage, and produces the reasonable result of maintaining the centrality of HSRs and SWARs to the process of ensuring LOWTDS are properly sited and designed.

E. Factual Issues Require A Remand Because The Board Did Not Allow Appellants To Finish Their Case In Chief.

Finally, the Superior Court at different times discussed the record, noting a lack of evidence, *see* Decision at 15-16 (A. 756-57) (discussing test borings), *id*. at 22 (whether there is evidence to contradict the Secretary's conclusions), or that the evidence in the record supports certain conclusions. *See id*. at 23 (discussing effects on drinking water). While Appellants believe the undisputed fact of no HSR and SWAR alone is sufficient to remand the 2017 Permit back to DNREC for processing in compliance with § 6.5, if this Court determines other factual issues are in play, Appellants note that the record before the Board (and thus this Court) is incomplete.

Appellants were in the middle of presenting Mr. Grobbel's testimony in their case-in-chief when DNREC orally moved for a "directed verdict" on the grounds that, if an HSR and SWAR are not required under the Regulations, then Appellants must lose. *See* 3/12/19 Transcript at 141 (A. 489). The EAB then stopped the proceedings,[18] heard argument, and voted to affirm the Secretary's Order. Setting

[18] The Superior Court's claim that Grobbel's testimony was stopped by the EAB because it related to operations of the treatment plant, *see* Decision at 8 (A. 749), has no basis in the record.

aside the procedural impropriety of a "directed verdict" motion in an administrative appeal involving no jury that was made the middle of a plaintiff/appellant's case-in-chief, *see e.g. Moody v. Nationwide Mut. Ins. Co.*, 549 A.2d 291, 292-93 (Del. 1988) ("Upon a motion for a directed verdict *after the evidence is in* the duty of the trial judge is to determine whether or not under any reasonable view of the evidence *the jury* could justifiably find in favor of the plaintiff and against the defendant" (emphasis supplied)), it is improper to draw any conclusions about the record before the Board without the Appellants having had an opportunity to introduce all of their evidence to create that record.[19] Thus, to the extent there are factual issues that need to be resolved in this appeal, then the matter should be remanded back to the Board for presentation of further evidence.

[19] For example, when DNREC made its motion for directed verdict, Appellant was presenting evidence to rebut a claim by DNREC that an HSR and SWAR were not necessary because the data submitted with the 2013 Permit was sufficient. While Appellants believe that such a claim does not show compliance with § 6.5, and the record already proves prior data did not comply with HSR requirements (*see* 3/12/19 Transcript at 63-65 (A. 411-13)), to the extent that DNREC wants to advance that claim, Appellants should be allowed to present evidence showing that the data used for the 2013 Permit does not meet the standards for an HSR and SWAR.

CONCLUSION

For the reasons set forth above, Appellants respectfully request that this Court reverse the June 10, 2019 Decision and Final Order of the Environmental Appeals Board and either: (1) remand the matter back to the Board for further proceedings to determine whether the issuance of the 2017 Permit complied with the applicable 2014 regulations; or (2) reverse the EAB Order and Secretary's Order and require the submission and consideration of the required HSR and SWAR before issuance of a construction permit to Artesian.

Respectfully submitted,

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Date: May 28, 2020

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CERTIFICATE OF TYPEFACE AND WORD COUNT COMPLIANCE

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Time New Roman 14-point typeface using Microsoft Word Office 365.

2. This brief complies with the word count limitation of Rule 14(d)(i) because the relevant sections contain 9896 words, which were counted by Microsoft Word Office 365.

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