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Case Number 138,2020

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.	)	

APPELLEE DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL'S ANSWERING BRIEF

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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NATURE AND STAGE OF PROCEEDINGS

By Decision and Final Order dated June 10, 2019 ("EAB Order"), the Environmental Appeals Board ("EAB") affirmed the Delaware Department of Natural Resources and Environmental Control's ("DNREC") Secretary's Order No. 2017-W-0029 ("Secretary's Order"), approving Artesian Wastewater Management, Inc.'s application ("Amendment Application") seeking to amend DNREC's October 15, 2013 Construction Permit ("2013 Permit") for Phase 1 of the Artesian Northern Sussex Regional Water Recharge Facility ("ANSRWRF") near Milton, Sussex County. The Secretary's Order ordered DNREC to issue the Amended Permit ("2017 Permit").

Appellants filed a timely appeal with the Environmental Appeals Board ("EAB" or "Board") pursuant to 7 *Del. C.* § 6008, challenging the Secretary's Order. On May 22, 2018 the EAB held a public hearing and granted Appellee's 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." On March 12, 2019, the EAB conducted a public hearing on the merits of the appeal and voted unanimously to affirm Secretary's Order No. 2017-W-0029.

On July 12, 2019, pursuant to 7 *Del. C.* § 6009 and Superior Court Rule 72, Appellants appealed the EAB Order to the Superior Court. Appellants argued the

EAB erred in holding that, as a matter of law, the applicable regulations as amended in 2014 ("2014 Regulations") do not apply to the Amendment Application, and therefore, the Secretary's Order was issued contrary to law because a Hydrogeologic Suitability Report and Surface Water Assessment Report were not submitted with the Amendment Application. Based on the record below, the Superior Court affirmed the EAB Order by Decision dated March 19, 2020 ("Decision").

Appellants timely appealed the Decision. This is DNREC's Answering Brief in support of the EAB Order. Appellants misconstrue DNREC's interpretation of the relevant regulations and further miscomprehend the judicial deference granted to an administrative agency in interpreting its regulations. The EAB, and Superior Court, properly determined that the Secretary's Order was supported by sufficient evidence. Accordingly, the EAB Order should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. The EAB made no determination regarding which iteration of the regulations applied to the Amendment Application. The EAB properly concluded the 2014 Regulations did not apply to the amendment to the existing construction permit. Further denied that there is no substantial evidence in the record that DNREC applied the prior regulations to the substantive review of the amendment.

2. Denied. The EAB was not required to engage in an analysis of what the 2014 Regulations require for the 2017 Permit and accordingly, no remand is necessary.

3. Denied. Section 6.3.1.14.1 of the 2017 Regulations 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." This section is ambiguous, and applying accepted regulatory interpretation methods, DNREC determined that this section grants discretion in analyzing whether a proposed modification is a "change" under the regulations requiring a new permit application.

4. Denied. As the Superior Court held, Artesian had previously "obtained" a permit. Sections 6.1 and 6.5 of the Regulations do not apply to amending a permit, which is what happened here.

5. Denied. Accepted principles of regulatory interpretation support DNREC's interpretation that site selection procedures, as defined in Section 6.2 of the 2017 Regulations, are contemplated to be one-time, initial steps. Further, the EAB properly granted DNREC deference to interpret its own regulations.

6. Denied. There are no factual issues left to resolve as this case turns exclusively on legal issues. Further, pursuant to the Motions in Limine granted by the EAB restricting the scope of permissible evidence "to evidence before the Secretary that speaks to the proper site selection and system design and not the operations of the plant," and 7 *Del. Admin. C* § 105-5.3, which limits presentations to "evidence which was before the Secretary," no additional evidence is permissible.

STATEMENT OF FACTS[1]

On October 15, 2013, DNREC granted Artesian Wastewater Management, Inc. ("Artesian") a permit ("2013 Permit") to construct Phase I of its wastewater treatment facility at ANSRWRF. A. 588-603. At that time, Artesian anticipated ANSRWRF would treat domestic wastewater from a proposed housing development in the town of Milton, and ANSRWRF would serve future wastewater needs in the area. A. 589. Originally, Phase I included construction of storage lagoons, spray fields, and the wastewater treatment plant. *Id.*

In 2017, Artesian submitted an application to DNREC to modify its existing and valid 2013 Permit in order to accept treated wastewater from Allen Harim Foods, LLC ("Allen Harim"). A. 001-002. The Amendment Application reduced the scope of the construction activities by moving construction of the wastewater treatment plant to Phase II of the project. A. 008. Phase I would still include construction of the spray fields, but as modified, Phase I would only construct one storage lagoon, moving construction of the second storage lagoon to Phase II. A. 039. Artesian reduced the overall number of storage lagoons for the project from three to two. The capacity of the Phase I storage lagoon was increased from 67.5 million gallons to 90 million gallons. *Id.* Finally, instead of accepting domestic wastewater from the

[1] All sources referenced in this Brief are included in the Appendix to Appellants' Opening Brief. Accordingly, all references to Appendix pages shall be to "A. __."

proposed residential development, the Amendment Application considered that ANSRWRF would accept treated wastewater from Allen Harim. A. 026.

On July 27, 2017, DNREC held a public hearing on Artesian's Amendment Application. A. 069. Approximately 100 people attended the public hearing, and DNREC received public comments. *Id.* On October 2, 2017, the Groundwater Discharges Section submitted a technical response memorandum ("TRM") to the hearing officer addressing those public comments. A. 070. The extensive public comments included questions about whether the Amendment Application was complete, and whether the Department should have required a new application, and updated well survey, floodplain, and wetland information. A. 073-077. The comments also inquired about the county's land use approvals, groundwater and drinking water concerns, surface water or soil contamination, odor, mosquito breeding, and Allen Harim's ability to treat the anticipated wastewater to spray irrigation standards. *Id.*

On October 5, 2017, the hearing officer issued his report considering the Amendment Application and supporting documentation, the public comments, and the TRM. A. 080-101. The Hearing Officer's Report memorialized the documents submitted in connection with the Amendment Application and established the Record. A. 084-090. The Hearing Officer's Report found, among other things, the Record, which included all the timely and relevant public comments, supported

approval of Artesian's Amendment Application and issuance of an amended construction permit. A. 099-101.

On November 2, 2017, DNREC issued Secretary's Order No. 2017-W-0029, which approved the permit that was issued on November 3 ("Amended Permit"). A. 068-079. The Secretary's Order considered the Hearing Officer's Report and the Record and directly addressed public comments. *Id.* The Secretary's Order acknowledged the public comments about spray irrigation of treated wastewater and stated that Artesian would be required to obtain an operation permit that would regulate the operational issues raised in the public comments. A. 077-078.

On November 28, 2017, Appellants appealed the Secretary's Order to the EAB. A. 125-130. Appellants raised four issues on appeal: (1) the amended construction permit application did not comply with the Regulations[2] as amended in 2014 which require the applicant to submit a Hydrogeologic Suitability Report ("HSR"), Surface Water Assessment Report ("SWAR"), and county or municipal land use approvals; (2) the Amended Permit does not comply with the TMDL for the Broadkill River; (3) the Amended Permit does not contemplate wastewater treatment at ANSRWRF; and (4) the Amended Permit is not supported by adequate technical documentation to approve a 90 million gallon storage lagoon. *Id.*

[2] Regulations Governing the Design, Installation and Operation of On-Site Wastewater Treatment and Disposal Systems, 7 *Del. Admin. C.* § 7101.

At the May 22, 2018 hearing, the EAB granted DNREC's Motion in Limine, restricting the scope of permissible evidence "to evidence before the Secretary that speaks to the proper site selection and system design and not the operations of the plant." A. 298. A hearing on the merits was then held March 12, 2019. A. 349. At the hearing, the first witness called was John G. Hayes, Jr., DNREC's Program Manager for the Large Systems Branch of the Groundwater Discharges Section.[3] A. 376. Mr. Hayes clearly stated DNREC's interpretation of Section 6.3.1.14.1, "We felt that there wasn't significant enough change to require a new permit." A. 424. Mr. Hayes explained DNREC's treatment of the Amendment Application. He confirmed the amended permit was considered under the former regulations. A. 431. He confirmed that site selection criteria are not generally reevaluated on an amendment and there were no changes that warranted such a reevaluation. A. 431-432. Mr. Hayes further testified that he is satisfied he had the information that would have been required for an HSR and SWAR. A. 433-435. He elaborated DNREC's exercise of caution by invoking the 2014 Regulations "for the changes that were applied to that existing permit." A. 396. Finally, Mr. Hayes testified Section 6.5 pertains to "a new permit application or a new project. It does not apply to existing in-force permits." A. 418-419.

[3] As both Appellants and DNREC intended to call Mr. Hayes, the parties and the Board agreed to allow DNREC to do direct examination at the same time as its cross examination. A. 375.

Appellants then presented the testimony of Christopher P. Groebel, an independent consultant primarily doing soil and groundwater investigation and remediation. A. 462-464. Appellants offered Mr. Groebel as an expert witness. A. 468. Appellees did not object to the qualifications but expressed their concerns as to the relevance of his testimony. *Id.* After presenting his opinion as to the purpose of Site Characterization under 6.2, Artesian objected to the testimony as being beyond the scope of the appeal. A. 475-482. Appellants asserted, "What he's going to testify to is that the information required under the regs for an HSR was not generated during the 2013 permitting process" and then acknowledged that there is no purpose to the testimony if the Board believes an HSR was not required. A. 485.

At this point, 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." A. 489. The EAB then requested "legal argument only the first three issues raised in the appellant's appeal." A. 493. The EAB unanimous voted in favor of DNREC's motion to affirm the Secretary's Order. A. 524-525.

The Board issued its Decision and Final Order on June 10, 2019 ("EAB Order"). A. 568-587. After reviewing the relevant facts and testimony elicited at the March 12, 2019 hearing, the Board held:

> 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 are significant. In this case DNREC determined 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. A. 579.

Additionally, the Board found the Secretary had sufficient evidence to conclude "the Sussex County zoning approval allowed for a regional wastewater facility to serve multiple sources and … reaffirmed its conditional use permit."[4] *Id.* Accordingly, the EAB affirmed the Secretary's decision by a vote of 6 to 0. *Id.*

Appellants appealed the EAB Order to the Superior Court on July 12, 2019. The Superior Court ruled on the record below and the briefs. The Superior Court defined its task as "determin[ing] 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." A. 753. While noting that the 2014 Regulations were unfortunately unclear with regard to this situation, the Superior Court held "Sections 6.1 and 6.5, by their clear language, do not apply" as Artesian had already "obtained" a permit, A. 758, and "Section 6.3.1.14.1, by its clear language, allows Artesian to seek an amendment to its existing construction permit," A. 760. Accordingly:

> The 2014 Regulations do not require Artesian to start the process from the beginning because it already had 'obtained' a construction permit for Phase 1

[4] DNREC notes that Appellants did not present any argument regarding the Sussex County zoning approval before the Superior Court. Accordingly, that argument was waived.

> of ANSRWRF. I further find that the Secretary and EAB were correct when they concluded that the changes Artesian sought to make to its already-issued construction permit were not substantial enough to require further hydrogeologic and soil studies. The changes involving the timing of the construction of the wastewater treatment plant, sizing of the lagoons, and spraying of treated food-processing water were all well within the previously-approved parameters for ANSRWRF. A. 764.

The Superior Court accordingly affirmed the EAB Order. A. 765.

ARGUMENT

I. THE EAB PROPERLY UPHELD DNREC'S DETERMINATION THAT THE PERMIT AMENDMENT IS SUBJECT TO THE REGULATIONS IN EFFECT AT THE TIME OF THE INITIAL PERMIT.

Question Presented

Whether the EAB properly held that the 2014 Regulations do not apply to the 2017 Permit, which is an amendment to an existing construction permit, because 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 enough to require a new permit?

Suggested Answer: Yes, the EAB properly upheld DNREC's interpretation of the 2014 Regulations that an amendment was the appropriate mechanism to effectuate the requested changes and substantive review of the Amendment Application was pursuant to the regulations in effect at the time of the initial permit.

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). "On an appeal from the Board, this Court's role is to determine whether the Board's decision is supported by substantial evidence and is free from legal error." *Tulou v. Raytheon Serv. Co.*, 659 A.2d 796, 802 (Del. Super. Ct. 1995). The Court does not weigh evidence, determine credibility, or make its own factual findings, but "merely determines if the evidence is legally adequate to support the Board's factual findings." *Motiva Enterprises LLC v. Sec'y of Dep't of Nat. Res. & Envtl. Control*, 745 A.2d 234, 242 (Del. Super. Ct. 1999). "Even if it would have reached a different conclusion, the Court will not substitute its judgment for that of the Board." *Nat'l Paint & Coatings Ass'n v. Delaware Dep't of Nat. Res. & Envtl. Control*, 2004 WL 440410, at *5 (Del. Super. Ct. 2004*), aff'd sub nom. Nat'l Paint & Coatings Ass'n v. Delaware Dep't of Nat. Res. & Env't Control & Delaware Envtl. Appeals Bd.*, 865 A.2d 522 (Del. 2005).

On appeal to the Board, the appellant bears the burden of proving that "the Secretary's decision is not supported by the evidence on the record." 7 *Del. C.* § 6008(b). Therefore, this Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency." 29 *Del. C.* § 10142(d). "Substantial weight and deference is accorded to the construction of a regulation enacted by an agency which is also charged with its enforcement" unless that interpretation is clearly erroneous. *State Farm Mut. Auto. Ins. Co. v. Mundorf*, 659

A.2d 215, 220 (Del. 1995). The agency's interpretation "need not be the only possible reading of a regulation – or even the best one – to prevail." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 613 (2013). An administrative agency's interpretation of its rules will not be reversed unless "clearly wrong." *Div. of Soc. Servs. of Dep't of Health & Soc. Servs. v. Burns*, 438 A.2d 1227, 1229 (Del. 1981).

The Court reviews questions of law, including statutory interpretation, *de novo*. *Delaware Dep't of Nat. Res. & Envtl. Control v. Sussex Cty.*, 34 A.3d 1087, 1090 (Del. 2011). In other words, this Court must determine if the Board "erred as a matter of law in formulating or applying legal precepts." *State v. Cephas*, 637 A.2d 20, 23 (Del. 1994). Therefore, this Court's review is limited to 1) whether the EAB's determination that DNREC's interpretation of 7 *Del. Admin. C.* § 7101 is not clearly wrong is free from legal error, and 2) whether the evidence before the EAB is legally adequate to support its conclusion that the Secretary's Order was based on sufficient evidence.

Merits of Argument

The construction and operation of wastewater treatment and disposal systems is governed by Regulations Governing the Design, Installation and Operation of On-Site Wastewater Treatment and Disposal Systems, 7 *Del. Admin. C.* § 7101, as amended in 2014. A. 622-741. It is undisputed that ANSRWRF as a facility and a project are governed by the 2014 Regulations. A. 057. The 2014 Regulations

explicitly allow for design changes during construction. "The permittee must submit a written report to the Department for review and approval of any changes to … construction of the system." 7 *Del. Admin. C.* § 7101-6.3.3.13. Simultaneously, approved systems must be built as authorized in the construction permit. 7 *Del. Admin. C.* § 7101-6.6.1. Accordingly, a permittee seeking to modify the approved design must request either a new construction permit or an amended permit, which Artesian did. DNREC then evaluated how to proceed with review of the Amendment Application pursuant to the 2014 Regulations.

DNREC determined the language of both the 2014 Regulations and the 2013 Construction Permit allow amendments to the permit. DNREC further concluded the proposed changes were consistent with the approvals granted in the 2013 Construction Permit, which reflected the entire proposed three-phase construction of a total 3.0 million gallons per day capacity regional wastewater treatment plant ("WWTP"), serving Artesian's public utility customers. Accordingly, DNREC determined that under the 2014 Regulations, a new construction permit was not necessary and evaluated the application as an application to amend the 2013 Construction Permit. As the 2014 Regulations are not retroactive, review of an application to amend the 2013 Construction Permit is governed by the regulations in effect at the time the permit was granted. The EAB affirmed this analysis and held "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." A. 579.

Appellants argue "that DNREC's stated interpretation is "factually unsupported," yet they entirely ignore that the very conduct they appealed to the EAB is such evidence. DNREC determined "the Application was administratively complete" without the HSR and SWAR. A. 069. This is absolute evidence that DNREC interpreted the 2014 Regulations as prescribing substantive review of the Amendment Application under the regulations in effect at the time of the initial permit.

DNREC has stated its position consistently: the project[5] is governed by the 2014 Regulations, A. 057, DNREC reviewed the Amendment Application pursuant to the 2014 Regulations, A. 071, the 2014 Regulations allow the requested changes to the 2013 Construction Permit, which is governed by the earlier regulations, to be made by amending the permit, *id.*, and, in an abundance of caution, DNREC reviewed the proposed changes under the 2014 Regulations to ensure the Amended Permit reflected sound engineering and updated standards, A. 394. The EAB Order accurately records DNREC's conclusions in reviewing the Amendment Application and granting the Amended Permit. The Board then applied the proper standard of

[5] DNREC defines project as the entire facility and all related construction. Appellants frequently conflate "project" and "permit." *E.g.* Opening Brief at 19.

deference granted to an agency's construction and interpretation of its own rules, stating, "DNREC's determination is not unreasonable or clearly wrong." A. 579. As DNREC's determination that the proposed changes were properly permitted by amending the 2013 Construction Permit, and this determination is not "clearly wrong," the EAB's decision should be affirmed.

A. The EAB Did Not Err When It Concluded the 2014 Regulations Allow Artesian to Apply for an Amendment of the 2013 Construction Permit.

The ultimate goal in interpreting a regulation is to ascertain and give effect to the administrative body's intention as expressed in the plain language of the regulation. *Alfieri v. Martelli*, 647 A.2d 52, 54 (Del. 1994). A regulation is ambiguous if it is reasonably susceptible to different conclusions or interpretations. *Leatherbury v. Greenspun*, 939 A.2d 1284, 1288 (Del. 2007). It is well established that courts defer to an agency's judgment "as to the meaning or requirements of its own rules, where those rules require interpretation or are ambiguous." *Couch v. Delmarva Power & Light Co.*, 593 A.2d 554, 562 (Del. Ch. 1991). Substantial weight is granted to an agency's construction of its own rules, such that the agency's construction will only be reversed if it is "clearly wrong." *Div. of Soc. Servs. of Dep't of Health & Soc. Servs. v. Burns*, 438 A.2d 1227, 1229 (Del. 1981).

The 2014 Regulations do not specify the method by which an amended permit is requested or approved. The only guidance provided, Section 6.3.1.14.1, 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.

Section 6.3.1.14.1 is clearly ambiguous, both as to the definition of "changes" as well as the definitions of "construction permit application, plans and specifications." In fact, Appellants concede that different degrees of change may require different treatment under Section 6.3.1.14.1. A. 197-198.

Appellants attempt to emphasize the differences in ANSRWRF as originally permitted and under the amended permit. Opening Brief at 26. These attempts, however, are based on layman's categorical definitions rather than a technical analysis of the wastewater. DNREC reviewed the modifications proposed by Artesian and determined they did not rise to the level of "changes" requiring a construction permit application pursuant to Section 6.3.1.14.1. In making that determination, DNREC compared the quality and quantity of wastewater and environmental effects of the proposed amendment to the 2013 Construction Permit and found:

> The Application's changes to the 2013 Construction Permit are consistent with the Department's 2013 Order, which reflected the Applicant's proposed three-phase construction of the Facility's total 3.0 MGD capacity as a regional WWTP, serving the Applicant's public utility customers. (A. 072).

Accordingly, under the 2014 Regulations, DNREC deemed Artesian's application to be an application to amend the existing, valid 2013 Construction Permit rather than a new construction permit application. A. 071 & A. 103.

Appellants have repeatedly proffered their interpretation that Section 6.3.1.14.1 does not authorize amendments but have never have argued or otherwise provided evidence that DNREC's interpretation is "clearly wrong." When directly questioned regarding the deference owed to DNREC's interpretation, Appellants offered no rebuttal, instead arguing DNREC's actions indicate it made a different interpretation. A. 407-408. Similarly, in their Opening Brief, Appellants again assert that the Secretary, Hearing Officer, and other DNREC staff "thought and acted like [the 2014 Regulations] did apply." Opening Brief at 20. Appellants conflate DNREC's regulatory interpretation that the substantive review of the Amendment Application is subject to the regulations in effect at the time of the initial permit Amendment Application, and DNREC's decision to consider and employ the substantive requirements of the 2014 Regulations in reviewing the application.

B. The 2014 Regulations Are Not Retroactive and Therefore Cannot Apply to the Amended 2013 Permit.

As discussed above, the relevant regulations were amended in 2014. It is undisputed that the 2014 Regulations supersede and replace the prior regulations. 7 *Del. Admin. C.* § 7101-1.3. Appellants, however, incorrectly conflate supersedure with retroactive application; applying a 2014 regulation to a 2013 permit is, by definition, retroactive. Appellants argue the 2014 Regulations apply to the Amendment Application because "nothing in the 2014 Regulations recognizes an exception to the application of those regulations to amendments of already-existing

permits." Opening Brief at 18. This argument, however, completely ignores the deeply rooted presumption against retroactivity and the absence of any language in the 2014 Regulations regarding retroactivity.

"The law disfavors retroactivity, and as a general rule, statutes are to be applied prospectively." 73 Am. Jur. 2d *Statutes* § 235, *see also Chrysler Corp. v. State*, 457 A.2d 345 (Del. 1983). "Statutes will not be retroactively applied unless there is a clear legislative intent to do so" as evidenced by the plain language of the statute. *Hubbard v. Hibbard Brown & Co.*, 633 A.2d 345, 354 (Del. 1993). Further, courts are reticent to apply statutes retroactively unless it "does not affect substantive or vested rights." *Id.* The essential inquiry in deciding whether a particular application of a statute is retroactive is whether the statute "attaches new legal consequences to events completed before its enactment." *Landgraf v. USI Film Prod.*, 511 U.S. 244, 270 (1994). That is precisely what would happen here if the 2014 Regulations were applied to the Amendment Application. DNREC and Artesian would effectively be required to begin the entire construction application process anew in order to affect what DNREC properly deemed an amendment rather than a new construction permit.

Appellants argue 7 *Del. Admin. C* § 7101-6.3.1.8 is evidence the 2014 Regulations apply to prior-issued permits. This Section states in pertinent part, "Any large system permitted prior to the promulgation of this regulation … shall have up

to 12 months from the date of promulgation to bring the system into compliance with the groundwater monitoring requirements." Appellants' argument utterly misstates the basic presumption of statutory construction that every word, clause, and sentence in a statute has a purpose, and words or phrases omitted in one clause but included elsewhere were omitted purposefully. 82 C.J.S. *Statutes* § 386. The statute should be construed to avoid superfluous, meaningless, or insignificant provisions. *Progressive N. Ins. Co. v. Mohr*, 47 A.3d 492, 496 (Del. 2012). Section 6.3.1.8's explicit requirement to bring a previously permitted system into compliance would be meaningless if the regulation were read as a whole to be retroactive. Rather than being a grace period as suggested by Appellants, this Section imposes a new requirement on previously permitted systems that would be redundant if the 2014 Regulations apply to previously issued permits. Appellants err in their interpretation of Section 6.3.1.8's treatment of prior-issued permits; it is an exception, not the rule.

The statute is not clearly retroactive either by its plain text or other textual evidence, and there is evidence that DNREC did not intend the regulations to apply retroactively. Therefore, and in accordance with the established legal presumption against retroactivity, it is clear DNREC cannot wholly apply the 2014 Regulations to permits approved prior to their promulgation. Here, where DNREC properly determined Artesian's application to be addressed by an amendment to the 2013 Permit, the 2014 Regulations cannot apply to the amendment.

C. The EAB Properly Deferred to DNREC's Interpretation of the 2014 Regulations.

Appellants argue the Board erred by relying on DNREC's conclusion that the 2014 Regulations do not apply to the Amendment Application. This argument is based on Appellants' erroneous position that "the entire factual record before the Board shows DNREC did the exact opposite of what the Board claimed it did." Appellant's Opening Brief at 22. Here, again, Appellants conflate DNREC's review of the Amendment Application and the law governing the substantive requirements of the permit and amendment themselves. As cited by Appellants, DNREC repeatedly insisted that "the project is governed by the 2014 Regulations" and Artesian acquiesced. A. 050. Accordingly, the Amendment Application was reviewed under the 2014 Regulations to determine proper treatment. Evaluating the changes requested pursuant to Section 6.3.1.14.1 and the 2013 Construction Permit, DNREC determined that the changes could be properly executed as an amendment.

In fact, the exact conduct on which Appellants base their claim that the Secretary's Order was in error is conclusive evidence of DNREC's determination. DNREC determined "the Application was administratively complete" without the HSR and SWAR. A. 069. This is irrefutable evidence that DNREC interpreted the 2014 Regulations as allowing an application to amend the 2013 Construction Permit, pursuant to the regulations in effect at the time of the initial permit. For Appellants to argue otherwise is a textbook example of circular reasoning.

Accordingly, the only remaining question is whether the EAB properly upheld DNREC's interpretation of the 2014 Regulations as allowing a permit amendment in this circumstance. "Substantial weight and deference is accorded to the construction of a regulation enacted by an agency which is also charged with its enforcement" unless that interpretation is clearly erroneous. *State Farm Mut. Auto. Ins. Co. v. Mundorf*, 659 A.2d 215, 220 (Del. 1995). The agency's interpretation "need not be the only possible reading of a regulation – or even the best one – to prevail." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 613 (2013). An administrative agency's interpretation of its rules will not be reversed unless "clearly wrong." *Div. of Soc. Servs. of Dep't of Health & Soc. Servs. v. Burns*, 438 A.2d 1227, 1229 (Del. 1981).

As explained by the Superior Court, the Secretary's conclusion and EAB's affirmation "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." A. 760-761.

Appellants offer no evidence that DNREC's determination was clearly wrong. Therefore, the EAB properly deferred to DNREC's interpretation of the 2014

Regulations. In fact, Plaintiffs have effectively conceded that DNREC's determination was not clearly wrong by failing to address it in their Opening Brief. *E.g. Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived"). Accordingly, the Board's decision should be affirmed.

II. IF THE 2014 REGULATIONS APPLY TO THE AMENDMENT APPLICATION, AN HSR AND SWAR WERE NOT REQUIRED BECAUSE THE 2014 REGULATIONS DO NOT CONTEMPLATE REPEATING SITE CHARACTERIZATION ONCE APPROVED.

Question Presented

Whether DNREC's interpretation of the 2014 Regulations that the proposed changes to the existing, valid construction permit did not require a new permit application or revisiting site characterization under 7 *Del. Admin. C.* § 7101-6.2 is not clearly wrong?

Suggested Answer: Yes, the plain language of 2014 Regulations definitively contemplates site characterization as a one-time, initial review unless there are substantial changes to the site or scope of the project, which there are not here.

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). "On an appeal from the Board, this Court's role is to determine whether the Board's decision is supported by substantial evidence and is free from

legal error." *Tulou v. Raytheon Serv. Co.*, 659 A.2d 796, 802 (Del. Super. Ct. 1995). The Court does not weigh evidence, determine credibility, or make its own factual findings, but "merely determines if the evidence is legally adequate to support the Board's factual findings." *Motiva Enterprises LLC v. Sec'y of Dep't of Nat. Res. & Envtl. Control*, 745 A.2d 234, 242 (Del. Super. Ct. 1999). "Even if it would have reached a different conclusion, the Court will not substitute its judgment for that of the Board." *Nat'l Paint & Coatings Ass'n v. Delaware Dep't of Nat. Res. & Envtl. Control*, 2004 WL 440410, at *5 (Del. Super. Ct. 2004*), aff'd sub nom. Nat'l Paint & Coatings Ass'n v. Delaware Dep't of Nat. Res. & Env't Control & Delaware Envtl. Appeals Bd.*, 865 A.2d 522 (Del. 2005).

On appeal to the Board, the appellant bears the burden of proving that "the Secretary's decision is not supported by the evidence on the record." 7 *Del. C.* § 6008(b). Therefore, this Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency." 29 *Del. C.* § 10142(d). "Substantial weight and deference is accorded to the construction of a regulation enacted by an agency which is also charged with its enforcement" unless that interpretation is clearly erroneous. *State Farm Mut. Auto. Ins. Co. v. Mundorf*, 659 A.2d 215, 220 (Del. 1995). The agency's interpretation "need not be the only possible reading of a regulation – or even the best one – to prevail." *Decker v. Nw.*

Envtl. Def. Ctr., 568 U.S. 597, 613 (2013). An administrative agency's interpretation of its rules will not be reversed unless "clearly wrong." *Div. of Soc. Servs. of Dep't of Health & Soc. Servs. v. Burns*, 438 A.2d 1227, 1229 (Del. 1981).

The Court reviews questions of law, including statutory interpretation, *de novo*. *Delaware Dep't of Nat. Res. & Envtl. Control v. Sussex Cty.*, 34 A.3d 1087, 1090 (Del. 2011). In other words, this Court must determine if the Board "erred as a matter of law in formulating or applying legal precepts." *State v. Cephas*, 637 A.2d 20, 23 (Del. 1994). Therefore, this Court's review is limited to 1) whether the EAB's determination that DNREC's interpretation of 7 *Del. Admin. C.* § 7101 is not clearly wrong is free from legal error, and 2) whether the evidence before the EAB is legally adequate to support its conclusion that the Secretary's Order was based on sufficient evidence.

Merits of Argument

The Board did not err when it concluded that the 2014 Regulations could not be retroactively applied to the substantive review of the Amendment Application. Accordingly, Appellants repeated assertion that the 2014 Regulations require the submission of an HSR and SWAR is moot. Even if the 2014 Regulations were substantively applied to the 2017 Construction Permit, however, the result would be the same. The 2014 Regulations, as interpreted by DNREC, consider Site Characterization to be a threshold analysis in a permit application for a new project,

addressing the suitability of the site for the project as a whole. That analysis is separate from and prior to considering construction phasing of specific components.

While the EAB Order does not engage in an analysis of whether an HSR and SWAR would be required if the 2014 Regulations had been substantively applied to the Amendment Application, the Court does not have to do so either because the Board did not err when it found the 2014 Regulations could not be retroactively applied to the substantive review of the Amendment Application. But even if the Court considers this question, the EAB Order remains free from legal error. As fully argued before the EAB, the 2014 Regulations do not contemplate resubmission of the Site Characterization data, including the HSR and SWAR, after that step of the new project application review is complete. Further, remand is inappropriate because this is solely a question of law, not fact.

As discussed in detail above, it is a basic presumption of statutory construction that every word, clause, and sentence in a statute has a purpose, and words or phrases omitted were omitted purposefully. 82 C.J.S. *Statutes* § 386. Statutes should be construed to avoid superfluous, meaningless, or insignificant provisions. *Id.* The various provisions of a statute should be reconciled in a way that promotes consistency, harmony, and function. 82 C.J.S. *Statutes* § 368.

As more fully discussed above,[6] the 2014 Regulations explicitly permit changes to a construction permit, but do not specify the method. Several sections, however, provide guidance as to what must be included in a new construction permit application:

6.3 Design Parameters

6.3.1 Standard requirements

6.3.1.14.1 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.

6.3.1.15.1 Once an operation permit has been issued and the wastewater flow reaches 80% of the permitted treatment capacity for the constructed phase … the permittee must submit written notification … includ[ing] a work plan for construction of the next permitted phase. The permittee must submit a construction permit application, plans and specifications and Design Engineer Report with applicable fees if the next phase has not yet been permitted or if there are changes to the previously permitted design.

6.5 Large System Permitting

In order to obtain a permit to construct and operate an on-site wastewater treatment and disposal systems 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.

6.5.2 Large System Construction Permit

6.5.2.2.2 If construction has not been initiated prior to the expiration of the construction permit, and there are proposed changes to the approved design, the applicant must submit a new or updated Design Engineer Report and

[6] *Supra* at 17.

> construction plans as outlined in Sections 6.2.3, 6.5.1.4 and 6.5.1.5 for project re-evaluation.
>
> 6.5.2.2.4 If construction has not been initiated or construction has not been completed prior to the expiration of the one (1) year extension, provided, the SIR is valid, and there are no changes to the approved design prior to the expiration of the construction permit, the applicant must submit a construction permit application along with applicable fees, and a construction schedule.

It is clear from these sections that different submissions are required for a new construction permit application depending on the circumstances. Specifically, Subsection 6.5.2.2.2 is the only subsection which references Site Characterization (Section 6.2) by requiring construction plans "as outlined in Section[] 6.2.3" – the HSR regulations. Subsection 6.5.2.2.2 controls in the limited situation where the permit has expired, construction has not been initiated, **and** the design has changed. In any other circumstance, including moving into the next phase where the next phase has not yet been permitted, there is no reference to the site characterization requirements. In fact, DNREC confirmed before the Board its interpretation that an HSR or SWAR will not be required when Artesian eventually submits its construction permit application for Phase II of ANSRWRF. A. 457-458.

Appellants contend the plain language of Section 6.5, which states, "A permit application will not be reviewed by the Department until the SIR, HSR and SWAR have been reviewed and approved by the Department" requires the submission of an HSR and SWAR before *any* permit is issued. This interpretation is fundamentally flawed. First, this interpretation hinges on treating the phrase "permit application"

as a term of art despite no definition, capitalization, history, or other accepted means of defining a term of art. Applying this cobbled term of art, Appellants assert, "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" but also inexplicably assert that the 2014 Regulations would not require an applicant to "start all over" to obtain subsequent construction or operations permits for other facilities that were similarly granted site approval under the former regulations. Opening Brief at 30-31. Effectively, Appellants create a term of art and then argue its selective application, both of which are contrary to accepted standards of statutory interpretation. Further, this asserted interpretation of Section 6.5 ignores the direct reference to the HSR in Subsection 6.5.2.2.2. If Section 6.5 required an HSR and SWAR before any individual application were reviewed, the reference in its own subsection would be superfluous and redundant. Lastly, it would also create the untenable position that any facility seeking a permit would be required to submit an HSR and SWAR, including an established facility seeking a renewed operation permit years or even decades after construction is complete.

DNREC's interpretation is that Section 6.5 requires approval of the Site Characterization documents as a threshold before proceeding to any other permitting phase. Once that threshold is passed, however, Site Characterization documents are

only reevaluated in extremely rare circumstances.[7] DNREC's interpretation is further bolstered by Section 6.2, which reads:

> The Department will facilitate compliance with these Regulations through a review of the proposed development project. The project should be coordinated with the Department early in the development process to avoid unnecessary conflicts and expense. 7 *Del. Admin. C* § 7101-6.2.

Interpreting the 2014 Regulations in a consistent, harmonious manner, it is clear DNREC promulgated these regulations intending Site Characterization to generally be an initial, one-time step.

To excuse the inconsistencies and flaws in their proposed interpretation, Appellants attempt create false importance of the HSR and SWAR documents, baselessly stating "the 2014 Regulations envision the HSR and SWAR as driving the design of the system being constructed." Opening Brief at 35. While Site Characterization is a requirement of the 2014 Regulations, Appellants dramatically overstate the weight of the requirements and the impact of the amendments to those requirements, while minimizing the background work that was submitted both with the initial application as well as with the Amendment Application.

As discussed in detail above, substantial weight is granted to an agency's construction of its own rules, such that the agency's construction will only be reversed if it is "clearly wrong." *Div. of Soc. Servs. of Dep't of Health & Soc. Servs.*

[7] *E.g.*, a supplemental SIR is required if a permit expires, is not renewed, and the SIR is more than 10 years old. 7 *Del. Admin. C* § 7101-6.2.2.5.

v. Burns, 438 A.2d 1227, 1229 (Del. 1981). There is no evidence to suggest DNREC's interpretation is "clearly wrong." DNREC reviewed and approved a Site Selection and Evaluation Report in 2007, which satisfied the regulatory requirements at the time for Site Characterization. DNREC determined that Site Characterization did not need to be repeated. Even so, in an abundance of caution, DNREC reviewed the approved Site Selection and Evaluation Report and additional information submitted with the Amendment Application and determined it had all the data necessary to satisfy the analysis required by Section 6.2. A. 433-435. Therefore, even if the 2014 Regulations do apply to the Amendment Application, DNREC did not err in issuing the Secretary's Order without requiring an HSR and SWAR. Accordingly, the court should uphold DNREC's interpretation that the 2014 Regulations do not contemplate repeating Site Characterization.

All of Appellants' arguments are questions of law based on regulatory interpretation and agency discretion. The standard of review before the EAB as well as on appeal limits the review to whether the Secretary's decision was based on substantial evidence. Appellants have at best argued alternative interpretations, but they have not demonstrated any inadequacy in the record before the Secretary or legal error. DNREC properly exercised its discretion in interpreting and applying the 2014 Regulations.

CONCLUSION

For the reasons set forth above, DNREC respectfully requests that this Court affirm the June 10, 2019 Decision and Final Order of the Environmental Appeals Board. To the extent the Court reaches the merits of Appellants' claims, DNREC respectfully request that the Court affirm the Secretary's Order.

Respectfully submitted,

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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