EFiled: Jun 01 2020 03:00PM EDT
Filing ID 65662696
Case Number Multi-Case

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DELAWARE SOLID WASTE AUTHORITY; GREGGO & FERRARA, INC; and CONTRACTORS HAULING, LLC,	§	Nos. 81, 2020 and 88, 2020
Appellees Below, Appellants/Cross-Appellees,	§	C O N S O L I D A T E D
v.	§	Court Below: Superior Court of the State of Delaware
DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL,	§	C.A. No. K19A-05-002
Appellants Below, Appellee/Cross-Appellant.	§	

APPELLANT/CROSS-APPELLEE
DELAWARE SOLID WASTE AUTHORITY'S
OPENING BRIEF

PARKOWSKI, GUERKE &
SWAYZE, P.A.

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DATED: June 1, 2020

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NATURE OF PROCEEDINGS

This is an interlocutory appeal[1] from the Superior Court's January 29, 2020 Memorandum Opinion and Order affirming in part, reversing in part, and remanding to the Environmental Appeals Board ("EAB" or "Board") for further proceedings.[2]

This case began as a consolidated hearing before the EAB on multiple appeals from Secretary's Orders issued by the Delaware Department of Natural Resources and Environmental Control ("DNREC") alleging various violations of permits and regulations pursuant to Title 7, Chapter 60 of the Delaware Code, and imposing administrative penalties and assessing costs. *See generally* A3-5. Appellant/cross-appellee Delaware Solid Waste Authority ("DSWA") appealed Secretary's Order No. 2018-WH-0066[3] (the "DSWA Order"); appellant/cross-appellee Greggo & Ferrara, Inc. ("G&F") appealed Secretary's Order No. 2018-WH-0067[4] (the "G&F Order"); and appellant/cross-appellee Contractors Hauling, LLC ("CH") appealed Secretary's Order No. 2018-WH-0068[5] (the "CH Order").

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[1] *See* D.I. 3, Order, Montgomery-Reeves, J. (Mar. 18, 2020) (accepting interlocutory appeals) (attached as Exhibit C).

[2] *See DNREC v. Del. Solid Waste Auth.*, 2020 WL 495210 (Del. Super. Ct. Jan. 29, 2020) (attached as Exhibit A).

[3] A288-98.

[4] A304-10.

[5] A311-18.

On February 12, 2019, the Board held a consolidated hearing on all three appeals, during which the Board heard witness testimony and received evidence. *See* A2-19. On May 13, 2019, the Board published its Decision and Final Order for all three appeals. *See* A1. The Board unanimously voted to reverse the DSWA Order; voted to rescind in part and remand the G&F Order; and voted to rescind in part and remand the CH Order. *See* A13.

On May 14, 2019, Appellee/cross-appellant DNREC appealed the Board's decision to the Superior Court.[6] After briefing, the Superior Court issued its January 29, 2020 Memorandum Opinion and Order in which it affirmed in part, reversed in part, and remanded to the EAB for further proceedings on the DSWA Order, the G&F Order, and the CH Order. *See Del. Solid Waste Auth.*, 2020 WL 495210, at *10-11.

Following the Superior Court's decision, each party applied for certification of an interlocutory appeal pursuant to Supreme Court Rule 42.[7] In a February 25, 2020 Order, the Superior Court granted the parties' applications for certification, finding that its January 29, 2020 Memorandum Opinion and Order satisfied the criteria of subsections (A), (C), (G), and (H) of Supreme Court Rule 42(b)(iii).[8]

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[6] *See DNREC v. Del. Solid Waste Auth.*, Civ. A. K19A-05-002 NEP, D.I. 1.

[7] *See id.* at D.I. 19-20, 22.

[8] *See id.* at D.I. 27 (Order, Primos, J. (Feb. 25, 2020)) (attached as Exhibit B).

This Court accepted and consolidated the parties' interlocutory appeals by Order dated March 18, 2020.[9] Counsel subsequently stipulated to a briefing scheduling, which this Court approved by Order dated April 2, 2020.[10]

This is the Appellant/cross-appellee DSWA's Opening Brief.

[9] *See* D.I. 3, Order, Montgomery-Reeves, J. (Mar. 18, 2020).

[10] *See* D.I. 5, Order, Montgomery-Reeves, J. (Apr. 2, 2020).

SUMMARY OF ARGUMENT

I. DNREC's permitting authority is expressly limited by 7 *Del. C.* § 6003(c), which requires that all permits issue in accordance with duly promulgated regulations. Condition II.I.2 of DSWA's Transfer Station Permit has no basis in a duly promulgated regulation, and therefore DNREC's inclusion of that Condition in the Permit exceeded DNREC's authority, and this Court should reverse the Superior Court and uphold the Board's finding that the Condition is invalid.

II. Condition II.I.2 of the Transfer Station Permit requires DSWA to "investigate and determine" the validity of permits of unaffiliated, third-party waste transporters but lacks meaningful standards to guide DSWA compliance or DNREC enforcement and has consequently lent itself to demonstrably erratic and arbitrary enforcement by DNREC. Therefore, this Court should affirm the Superior Court's finding that Condition II.I.2 is unconstitutionally vague. Moreover, Condition II.I.2 is unreasonable as applied to DSWA because DNREC has failed to provide the direction, training, or regulatory tools necessary for DSWA to achieve compliance.

III. Condition II.I.2 of the Transfer Station Permit, which requires DSWA to police an unaffiliated third-party's regulatory compliance, is an unconstitutional subdelegation of executive power in violation of the Delaware Constitution and 7 *Del. C.* § 6005(a), and therefore invalid.

IV. The Board correctly determined that DSWA satisfies the information reporting requirements of its Transfer Station and Landfill Permits when it reports to DNREC a complete list of all transporters it knew to have hauled waste from its facilities. The Board's finding is supported by substantial evidence, and the Superior Court's reversal of the Board's conclusion is erroneous and leads to the absurd result of an impossible and unreasonable compliance standard.

STATEMENT OF FACTS

DSWA is a body politic and corporate created pursuant to Chapter 64, Title 7 of the Delaware Code. Pine Tree Corners Transfer Station ("PTCTS") is a solid waste transfer station near Townsend, Delaware, owned by DSWA. *See* A3. PTCTS receives solid waste from commercial waste haulers as well as Delaware residents and businesses, mainly from northern Kent County and southern New Castle County. *See* A72. PTCTS provides a convenient local destination for private haulers and individuals to bring their waste, thus saving residents and businesses the cost and inconvenience of traveling to a landfill site. *See* A72. Solid waste received at PTCTS is aggregated and then transported to landfills, including DSWA's Central Solid Waste Management Center ("CSWMC") near Sandtown, Delaware. *See* A72-58; A77.

Both the PTCTS and CSWMC facilities are subject to DNREC permits. The permit for PTCTS, Permit SW-06/04 ("Transfer Station Permit"), and the permit for CSWMC, Permit SW-10/01 ("Landfill Permit"), have annual reporting requirements that include submitting to DNREC a list of transporters that hauled waste to or from the facility during the prior year. *See* A328, A354. The Transfer Station Permit requires DSWA to submit an annual report by March 1st of each year, *see* A328, and the Landfill Permit requires DSWA to submit an annual report by April 30th of each

year. *See* A354. In addition, Condition II.I.2 of the Transfer Station Permit contains the following requirements:

> All vehicles transporting waste from the Transfer Station shall have a valid solid waste transporters permit issued by the DNREC. In their contracts with transporters hauling waste from the Transfer Station, the DSWA shall stipulate that the contractor maintain a valid solid waste transporter permit issued by the DNREC. DSWA shall investigate and determine the current validity of the permit if it has reason to suspect a permit is not valid. All vehicles transporting waste collected by the HHW collection program from the Transfer Station shall have a valid hazardous waste transporters permit issued by the DNREC.

A324.

Although DSWA owns PTCTS, since September 2017 it has contracted virtually the entirety of its operation and maintenance to G&F, a third-party. *See* A73-74. *See generally* A366-389. Indeed, DSWA's only direct involvement in the operation of PTCTS is the manning of the "scale house" where incoming waste is weighed. *See* A74. Under its contract with DSWA, it is G&F who is responsible for transporting solid waste from PTCTS to landfills, such as CSWMC. *See* A73-74.

Delaware's *Regulations Governing Solid Waste* (the "*Regulations*") require solid waste transporters such as G&F to first obtain a transporter's permit from DNREC before transporting solid waste. *See* 7 *Del. Admin.* C. § 1301-4.1.1.2. Therefore, and consistent with Condition II.I.2 of the Transfer Station Permit, when G&F bid on what became its contract with DSWA for the operation of PTCTS,

DSWA required G&F to provide a copy of its solid waste transporters permit in its bid package. A75.

On or about June 14, 2018, DSWA's Chief of Business and Governmental Services, Michael D. Parkowski, received a call from a retired DNREC employee who believed she saw a truck transporting waste from PTCTS that did not appear to be the subject of a DNREC transporter's permit. *See* A78. On or about the same day, Mr. Parkowski asked DSWA's Supervisor of Compliance, Fred Oehler, to investigate. A79. Mr. Oehler found that G&F had been using trucks to transport solid waste that did not display a DNREC transporter permit sticker. *See* A79, A91, A162. It was at this point that DSWA learned <u>for the first time</u> that G&F had been using vehicles owned by CH, a subsidiary of G&F. A79, A91, A162.

G&F personnel advised DSWA that they would inquire with DNREC to see if a separate transporter's permit was necessary for its CH vehicles. A168, A174. Approximately one week later, G&F advised DSWA that it was unable to make contact with DNREC, and so it decided to have CH apply for its own transporter's permit. A92, A174. It appears that at least one message was left with DNREC's Senior Environmental Compliance Specialist, Tara Grazier, who did not return the telephone call. A131, A168.

On July 25, 2018, DNREC Environmental Protection Officer Tyler Austin observed a truck hauling waste from PTCTS with a cab marked "Contractors

Hauling" but bearing no DNREC solid waste transporter number. A118-19. Officer Austin called Tara Grazier at DNREC to see whether CH had a transporter's permit. A118. Ms. Grazier advised Officer Austin that CH did not have a transporter's permit, which prompted Officer Austin to stop the CH truck. A118. Officer Austin later recalled that the CH truck was properly tarped, and no solid waste or debris was escaping the vehicle. *See* A121. Other than lacking a solid waste transporter's permit, Officer Austin observed no other violations of DNREC regulations. A126-28, A159. After the July 25, 2018 traffic stop, G&F engaged a third party to haul waste until August 1, 2018, when CH received its own transporter's permit. A166.

In the wake of the traffic stop, DNREC first issued a Notice of Violation to DSWA, and thereafter a Secretary's Order to DSWA. *See* A300-02; A288-98. In both the Notice of Violation and the Secretary's Order, DNREC alleged that DSWA violated Condition II.I.2 of its Transfer Station Permit because CH had not been a permitted transporter, and also violated Condition III.B.2 of its Transfer Station Permit and Condition V.B.3 of its Landfill Permit because DSWA did not list CH as a transporter in its 2017 annual reports. *See* A300-02; A288-98. The Secretary's Order also assessed administrative penalties ($18,174.80)[11] and costs ($1,198.80)[12]

[11] The Secretary asserted that the administrative penalty was assessed pursuant to 7 *Del*. *C*. § 6005(b)(3). *See* A293.

[12] The Secretary asserted that the costs were assessed pursuant to 7 *Del*. *C*. § 6005(c). *See* A294.

against DSWA as a result of the purported violations. *See* A293-94. DSWA appealed the DNREC Secretary's Order to the EAB.

At the hearing, DSWA's Facility Manager for PTCTS and CSWMC testified that the 2017 annual reports for both facilities were submitted to DNREC by March 1, 2018, and that at the time he had no knowledge of CH's involvement in the transportation of waste for G&F. *See* A7. As a result of this lack of knowledge and the fact that G&F was contractually responsible for PTCTS operations, DSWA's Facility Manager did not list CH as a transporter on DSWA's 2017 annual reports. *See* A94. Nor was there any cause to believe any violation was occurring. Witnesses from both DSWA and DNREC testified that it is not unusual to have a licensed solid waste transporter hauling under more than one trade name. *See* A80, A93, A149. In fact, DNREC performed a compliance inspection at PTCTS on March 23, 2018, and did not cite DSWA or G&F for any violations of solid waste permits even though the compliance inspection took place during a time when G&F was using CH vehicles to transport waste. *See* A111-13.

At no time did DNREC provide DSWA with a list of haulers holding transporter permits. A80. Nor did DNREC offer any training to DSWA personnel on how to identify unpermitted vehicles, such as explaining the purpose of vehicle permit stickers and whether they might expire, or whether a permittee would be validly permitted without a sticker, etc. A81, A93, A140. Moreover, DSWA staff

manning the scale house are trained to look for a vehicle's DSWA license number, not DNREC permit numbers. A109.

Following the EAB hearing, the Board issued its Decision and Final Order in which it unanimously reversed the violations asserted in the Secretary's Order to DSWA. A11-13. The Board correctly held that Condition II.I.2 of the Transfer Station Permit, which required DSWA to "investigate and determine" the existence and validity of another's DNREC permit status, was unlawful and an unauthorized delegation of DNREC authority. *See* A11. The Board also properly held that DSWA did not violate the reporting requirements of its Transfer Station Permit and Landfill Permit because DSWA had no knowledge G&F was using CH vehicles until after the reports were filed. *See id.* DNREC appealed the Board's decision to the Superior Court.

The Superior Court's Decision on Appeal from the EAB

DSWA defended the Board's decision on appeal, asserting several grounds for affirmance. First, that Condition II.I.2 of the Transfer Station Permit was correctly held to be invalid because (1) the Condition lacked a basis in a duly promulgated regulation pursuant to 7 *Del. C.* § 6003(c); (2) the Condition was unconstitutionally vague and unreasonable; and (3) the Condition was an unconstitutional delegation of DNREC authority to an outside entity. *See Del. Solid Waste Auth.*, 2020 WL 495210, at *4. *See also* A412-24. Second, that DSWA did

not violate the reporting requirements of its Transfer Station Permit and Landfill Permit by not listing CH as a transporter because at the time it filed its annual report, DSWA had no knowledge of CH's involvement. *See* A427-29.

On appeal, the Superior Court concluded that Condition II.I.2 did not violate 7 *Del. C.* § 6003(c) for want of a duly promulgated regulatory antecedent. *See Del. Solid Waste Auth.*, 2020 WL 495210, at *6. Relying on *Formosa Plastics Corp. v. Wilson*, 504 A.2d 1083 (Del. 1986), the Superior Court held that DNREC may impose reasonable permit conditions that do not have an explicit basis in a specific regulation. *See id.* However, the Superior Court found that "Condition II.I.2 is unconstitutionally vague, and specifically that it both fails to give notice of behavior forbidden by the Condition, and lends itself to arbitrary or erratic enforcement." *See Del. Solid Waste Auth.*, 2020 WL 495210, at *7, 13-15. Having found Condition II.I.2 unconstitutionally vague, the Superior Court did not reach the issue of whether the Condition was otherwise unreasonable or an unconstitutional delegation of agency authority. *See id.* at *15.

The Superior Court reversed the Board's conclusion that DSWA did not violate the reporting requirements of its Permits. *See id.* at *17-19. According to the Superior Court, DSWA was required to submit a list of "all" transporters "regardless of its knowledge or lack thereof," and because DSWA did not list CH as transporters on its annual reports, DSWA was strictly liable for a permit violation

under 7 *Del*. *C*. § 6005(b). *See id.* at *9. The Superior Court therefore remanded to the Board for a determination of what the appropriate penalty assessment should be for the reporting violation. *See id.* at *9. This interlocutory appeal followed.

ARGUMENT

I. Condition II.I.2 of the Transfer Station Permit has no basis in a duly promulgated regulation and therefore its inclusion by DNREC in the Permit violated 7 *Del. C.* § 6003(c) and exceeded DNREC's statutory authority.

A. Question Presented

Whether the EAB correctly concluded that Condition II.I.2 is invalid because the Condition lacks a regulatory antecedent and therefore exceeds DNREC's authority in violation of 7 *Del. C.* § 6003(c)? A207-08; A412-15.

B. Scope of Review

The Court reviews issues of statutory interpretation *de novo*. *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 382 (Del. 1999).

C. Merits of Argument

DNREC is an administrative agency established by the General Assembly and therefore bound by the terms of its legislatively delegated authority. *See Bridgeville Rifle & Pistol Club*, 176 A.3d 632, 661 (Del. 2017). Thus, DNREC has only so much authority as is reasonably necessary to execute its delegated powers, and no more. *See id.* Chapter 60 of Title 7 tasks DNREC with the authority to regulate solid waste, *see* 7 *Del. C.* § 6001 *et seq.*, which includes the power to issue permits and enforce their conditions. *See* 7 *Del. C.* §§ 6003, 6005. DNREC's permitting authority, however, has an express limitation. Permits can only issue in accordance with duly promulgated regulations. *See* 7 *Del. C.* § 6003(c) ("The Secretary shall

grant or deny a permit required by subsection (a) or (b) of this section in accordance with duly promulgated regulations . . . .”). In this case, DNREC imposed a permit condition (Condition II.I.2 of the Transfer Station Permit) that has no basis in a duly promulgated regulation, and therefore that Condition is invalid.

Condition II.I.2 requires, among other things, that “DSWA shall investigate and determine the current validity of [a waste transporter’s] permit if it has reason to suspect a permit is not valid.” A324. This permit condition is bereft of a regulatory basis, either explicit or implicit. No current regulation allows DNREC to require permittees to “investigate and determine” the validity of permits DNREC issues to other parties, and no regulation more generally allows DNREC to subdelegate its own investigatory and enforcement powers to a non-DNREC entity for the purpose of ensuring the regulatory compliance of an unaffiliated third-party.

DNREC has promulgated many regulations governing solid waste, including those that govern the operation of transfer stations and solid waste transportation. *See generally* 7 *Del*. *Admin*. *C*. § 1301 *et seq.* But of all the promulgated regulations concerning the operation and maintenance of transfer stations, none obligate a transfer station operator to ensure the current validity of any transporter’s permit, and none include any provisions indicating that DNREC may impose such an obligation as a permit condition. *See, e.g.,* 7 *Del*. *Admin*. C. § 1301-10.5. Furthermore, none of the promulgated regulations governing solid waste

transporters subject a transporter to regulatory enforcement by a transfer station operator or any other entity besides DNREC. *See* 7 *Del*. *Admin*. C. § 1301-7.0.

Since Condition II.I.2 lacks a basis in regulation it violates 7 *Del*. *C*. § 6003(c) and exceeds DNREC's permitting authority, and therefore it must be deemed invalid.

The Superior Court, relying on *Formosa Plastics Corp. v. Wilson,* 504 A.2d 1083 (Del. 1986), held that DNREC does not need a regulatory antecedent to impose Condition II.I.2. *See Del. Solid Waste Auth.*, 2020 WL 495210, at *6. In the Superior Court's view, imposing a regulatory perquisite for permit conditions would impair DNREC's "unquestioned power to impose *reasonable conditions* upon [the] issuance [of a permit]" and would "hinder DNREC 's ability to 'preserve the land, air and water resources of the State.'" *Id*. at *6 (quoting *Formosa*, 504 A.2d at 1089) (emphasis original). Although the Superior Court went on to correctly hold that Condition II.I.2 is unconstitutionally vague, the Superior Court's conclusion that DNREC may impose permit conditions without a basis in a specific regulation is erroneous and defeats the protections afforded by the Delaware Administrative Procedures Act.

While DNREC's legislatively-delegated authority includes the power to issue permits and apply reasonable conditions on their issuance, it is also "axiomatic that delegated power may be exercised only in accordance with the terms of its

delegation." *See Bridgeville Rifle & Pistol Club*, 176 A.3d at 661 (quoting *New Castle Cty. Council v. BC Dev. Assocs.*, 567 A.2d 1271, 1275 (Del. 1989)). Thus, whatever implied authority DNREC possesses to condition permits, it must necessarily yield to the express limitations imposed by the General Assembly. Through § 6003(c), the General Assembly expressly limited DNREC's authority by requiring that permits may only issue "in accordance with ***duly promulgated regulations*** . . . ." *See* 7 *Del. C.* § 6003(c) (emphasis supplied). The Superior Court's holding nullified the express terms of § 6003(c), essentially stripping it out of the statute. This violates a cardinal rule of statutory construction that words in a statute "should not be construed as surplusage if there is a reasonable construction which will give them meaning." *Progressive N. Ins. Co. v. Mohr*, 47 A.3d 492, 495 (Del. 2012).

When DNREC wants to promulgate regulations it must comply with the Delaware Administrative Procedures Act. *See Baker v. Delaware Dep't of Nat. Res. & Envtl. Control*, 2015 WL 5971784, at *12 (Del. Super. Ct. Oct. 7, 2015), *aff'd*, 137 A.3d 122 (Del. 2016). That process incorporates a number of due process safeguards including making the proposed regulations publicly available, 29 *Del. C.* § 10112, noticing and holding a public hearing on the proposed regulations, 29 *Del. C.* § 10115, creating a record of public comments, testimony, and evidence regarding the proposed regulation, 29 *Del. C.* § 10116-18, and publishing a final order, which

is then subject to judicial review. *See* 29 *Del. C.* §§ 10118, 10141. These procedural requirements under the Delaware APA provide important safeguards against arbitrary regulatory enforcement. By providing proposed regulations and permitting public comments well in advance of their enforcement it allows regulated parties like solid waste transfer station operators and transporters and the public at large to head off regulatory overreach. It also provides space for public negotiation of fair regulatory standards outside of the individual permitting process where DNREC's leverage to exact permit conditions is inherently coercive.

The Superior Court's reliance on *Formosa* to relieve DNREC of the § 6003(c) prerequisite for permit conditions is misplaced. This Court specifically acknowledged that the permits in *Formosa* were the product of valid DNREC regulations: "All of Formosa's permits are issued pursuant to, are consistent with, make specific reference to, the applicable provisions of those regulations." *Formosa*, at *1089. The Court also cautioned that however broad and plenary the Secretary's powers may be, "it is not to be overlooked that procedural safeguards and fairness must accompany their exercise. This is essential in marking the 'difference between rule by law and rule by whim or caprice.'" *Id.* One of the reasons this Court found that the DNREC Secretary did not violate Formosa's due process rights was that the permit revocation followed a clear statutory and regulatory framework which included enforcement of "detailed conditions and

limitations placed by [the Secretary] upon Formosa's permits ***issued pursuant to well-defined regulations*** . . . ." *See id.* at 1090 (emphasis added). Section 6003(c) and *Formosa* establish that permit conditions that do not follow from duly promulgated regulations are not "issued pursuant to", are not "consistent with", and cannot make "specific reference to" applicable regulations, and are therefore unreasonable as a matter of law.

In this case, DNREC skipped the rulemaking process and thereby violated the express terms of 7 *Del. C.* § 6003(c) and deprived DSWA of the safeguards afforded by the Delaware APA. Condition II.I.2 of the Permit has no express or implied basis in a duly promulgated regulation and therefore must be held unlawful and invalid. To hold otherwise releases DNREC from the limits of its delegated authority and leaves the regulated community subject to the injustice of bureaucratic whim and caprice.

II. Condition II.I.2 of the Transfer Station Permit violates the Due Process Clause of the Delaware Constitution because it is unconstitutionally vague and unreasonable.

A. Question Presented

Whether Condition II.I.2 of the Transfer Station Permit is unconstitutionally vague and unreasonable for (1) failing to provide meaningful standards for enforcement or conformance of conduct;[13] and (2) failing to provide necessary tools to achieve compliance. A415-23; A394.

B. Scope of Review

This Court decides questions of law and constitutional claims *de novo*. *Bridgeville Rifle & Pistol Club*, 176 A.3d at 640.

C. Merits of Argument

1. Neither the Transfer Station Permit nor the *Regulations* provide meaningful standards for DSWA to comply with Condition II.I.2 or for DNREC to enforce it.

The Superior Court correctly found that "Condition II.I.2 is unconstitutionally vague, and specifically that it both fails to give notice of behavior forbidden by the Condition, and lends itself to arbitrary or erratic enforcement." *Del. Solid Waste Auth.*, 2020 WL 495210, at *7. In Delaware, the due process of law guaranteed by

[13] The Superior Court found in favor of DSWA on this issue, but due to the complex procedural posture of this consolidated interlocutory appeal, DSWA believes it prudent to address this issue in its Opening Brief.

the Delaware Constitution requires that "a statute which imposes a standard of conduct for the breach of which an individual will be held responsible must define the conduct with sufficient particularity to enable him to make his conduct conform." *Globe Liquor Co. v. Four Roses Distillers Co.*, 281 A.2d 19, 22 (Del. 1971). *See also Del. Const.* art. I, § 9. An unconstitutionally vague rule is one that "fails to give a person of ordinary intelligence fair notice that his contemplated behavior is forbidden by the statute, or if it encourages arbitrary or erratic enforcement." *Wein v. State*, 882 A.2d 183, 187 (Del. 2005). It is therefore necessary under the vagueness doctrine for regulatory rules to establish minimum guidelines to govern law enforcement. *See id.* & n.15. The *Regulations* and Condition II.I.2 do not provide meaningful standards, are unconstitutionally vague, and cannot be enforced.

The constitutionally deficient portion of Condition II.I.2 states: "DSWA shall investigate and determine the current validity of the permit if it has reason to suspect a permit is not valid." A324. *See Del. Solid Waste Auth.*, 2020 WL 495210 at *7. None of the operative terms in this Condition are defined in the *Regulations*. "Investigate" is not defined, nor is "determine" or "current validity", nor is what constitutes a "valid" DNNREC permit. *See* 7 *Del. Admin. C.* § 1301-3.0. There is also nothing in the *Regulations* concerning the operation and maintenance of transfer stations that addresses what method or mechanism DSWA must employ to

satisfactorily "investigate and determine the current validity" of a transporter's permit. *See* 7 *Del. Admin. C.* § 1301-10.5.

One consequence of DNREC failing to ground Condition II.I.2 in a duly promulgated regulation, *see* discussion *supra* Part I, is that there exist no meaningful standards apprising DSWA of how it must discharge its "investigate and determine" obligation. Another consequence is, as the Superior Court correctly observed, the tendency of such vague terms to lead to arbitrary or erratic enforcement, which is evident in DNREC's shifting positions in this case as to what Condition II.I.2 requires of DSWA. *See Del. Solid Waste Auth.*, 2020 WL 495210, at *7-8.

For example, in DNREC's Notice of Violation to DSWA, the DNREC Secretary cited DSWA for its alleged failure to "**ensure** that all vehicles transporting solid waste from the facility **possess and maintain** a valid transporter permit from DNREC." A301 (emphasis added). Condition II.I.2 does not have any such language. Whatever the "investigate and determine" condition entails, it does not state that DSWA must "ensure all vehicles . . . possess and maintain" a valid permit. As with the "investigate and determine" language, neither the Permit nor the *Regulations* provide any direction on how a transfer station operator satisfies the "possess and maintain" requirement stated in DNREC's Notice of Violation. Nor do they provide any guidance on how DSWA would "ensure" the compliance of an unaffiliated third-party that it does not control. Moreover, as the Superior Court

pointed out, DNREC's allegation that DSWA violated Condition II.I.2 for failing to "ensure" all transporters had a valid permit imposes a stricter burden than the permit's stated requirement that DSWA "investigate and determine" only "if it has reason to suspect a permit is not valid." *See Del. Solid Waste Auth.*, 2020 WL 495210, at *7.

Following the Notice of Violation, DNREC issued a Secretary's Order, which further muddied the waters by concluding that DSWA violated Condition II.I.2 because it had failed to "**ensure** that all vehicles that transfer solid waste from its [transfer station] **possess** a valid Delaware solid waste transporter permit . . . ." A292 (emphasis added). The now-abbreviated standard of "possess" is different than the "possess and maintain" standard noted in the Notice of Violation, and both are different than the "investigate and determine" standard stated in the Permit. And again, in neither the Notice of Violation nor the Secretary's Order does DNREC explain how or what would satisfy the "ensure" requirement, or why the conditional obligation stated in Condition II.I.2 appears to no longer apply. Thus, by the time DSWA entered the EAB hearing room, DNREC had given DSWA three different standards for compliance: (1) based on its permit, DSWA must "investigate and determine the current validity" of a transporter's permit but only if it had reason to suspect its invalidity; (2) based on the Notice of Violation, DSWA must "ensure all

vehicles . . . possess and maintain" a valid permit; and (3) based on the Secretary's Order, DSWA must "ensure that all vehicles . . . possess" a valid permit.

During the course of the EAB hearing and in subsequent appellate briefing DNREC's position as to DSWA's precise obligations continued to evolve. DNREC's *new* formulation maintained that "investigate and determine" only requires that DSWA call DNREC and "inquir[e] with the Department" to verify that an entity is properly permitted. *See* A219-20; *Del. Solid Waste Auth.*, Civ. A. K19A-05-002 NEP, D.I. 12, Op. Br. at 16.

Condition II.I.2 of the Transfer Station Permit imposes conditions without adequately defined standards to guide either DSWA's conduct or DNREC's enforcement. The vagueness of the Condition invites arbitrary enforcement by DNREC, which is evident in the inconsistent way DNREC has characterized DSWA's obligations throughout this litigation. No reasonable transfer station operator can be sure that what today satisfies "investigate and determine" would also do so tomorrow. For the reasons explained above, Condition II.I.2 is fatally vague and inconsistent with the Delaware Constitution and should be deemed unlawful, as the Superior Court found.

2. Condition II.I.2 is unreasonable because DNREC has failed to provide the direction, training, or regulatory tools necessary for DSWA to achieve compliance.

While DNREC may have the authority to impose conditions on permits, those conditions must be reasonable. *See Formosa*, 504 A.2d at 1089. Condition II.I.2 does not represent a reasonable permit condition. That Condition is *per se* unreasonable because it exceeds DNREC's statutory authority,[14] is unconstitutionally vague,[15] and is also an unconstitutional subdelegation of executive power.[16] Condition II.I.2 of the Permit is also an unreasonable condition as applied to DSWA.

Condition II.I.2 of the Transfer Station Permit deputizes DSWA and tasks it with the regulatory enforcement of unaffiliated third-parties.[17] Even if it were assumed that DSWA has the authority to enforce DNREC's permitting regime, DNREC failed to provide DSWA the necessary means to do so. Under the *Regulations*, only DNREC is given the tools necessary to investigate and determine regulated parties' compliance with permits and regulations. *See* 7 *Del. Admin. C.* § 1301-4.1.9. Only DNREC is empowered to enter upon any facility at any reasonable

[14] *See* discussion *supra* Part I.

[15] *See* discussion *supra* Part II.1.

[16] *See* discussion *infra* Part III.

[17] *See* discussion *infra* Part III.

time to inspect vehicles or equipment. *See* 7 *Del*. *Admin*. *C*. § 1301-4.1.9.1-2. Only DNREC can require interviews, command reports, administer tests, or demand any other information necessary to verify compliance with permits or regulations. *See id*. § 1301-4.1.9.3. None of those regulatory tools are available to DSWA under either its Permit or the *Regulations*.

In addition, the *Regulations* only require solid waste transporters to present their transporter permits at the request of law enforcement officers or representatives of DNREC. *See* 7 *Del*. *Admin*. *C*. § 1301-7.1.5. Nothing in the *Regulations* provide that power to DSWA. And while it so happens that DSWA reserves a contractual right to inspect a contractor's transporters permit, the *Regulations* do not provide a mechanism for compelling its production. *See* A374. Moreover, DNREC never provided DSWA with a list of haulers holding transporter permits, nor did DNREC offer any training to DSWA personnel on how to identify unpermitted vehicles. DNREC offered no instruction on the purpose of vehicle permit stickers and what they represented, whether a permit sticker can expire, whether a permit can be determined valid in the absence of a permit sticker, and who has the obligation to apply the permit sticker.

DSWA and its staff are trained in the operation of transfer stations and landfills, but they are not trained to enforce DNREC permits, nor are they given the necessary tools to do so. If DNREC intends to give DSWA a lawman's badge and

gun, it then has an obligation to provide training and direction of the utmost clarity. DNREC has failed to do that here. Condition II.I.2 is unreasonable and should be deemed invalid.

III. Condition II.I.2 of the Transfer Station Permit is an unconstitutional subdelegation of executive power because it deputizes an outside party to enforce DNREC's permitting regime against a third-party.

A. Question Presented

Whether DNREC unconstitutionally subdelegated its executive power by deputizing DSWA, an outside party, to enforce DNREC's permitting regime against a third-party?[18] A424-26; A393.

B. Scope of Review

This Court decides questions of law and constitutional claims *de novo*. *Bridgeville Rifle & Pistol Club*, 176 A.3d at 640.

C. Merits of Argument

Even if DNREC had promulgated regulations permitting Condition II.I.2 of the Transfer Station Permit, and even if DNREC had provided definite standards and necessary training to enable DSWA to carry out the Condition, that delegation of authority nevertheless fails as an unconstitutional subdelegation of executive power to an outside party.

The sovereign power of government vested by the Delaware Constitution in the legislative, executive, and judicial branches may not be delegated to unaccountable outside organizations. *See State ex rel. James v. Schorr*, 65 A.2d 810,

[18] The Superior Court found Condition II.I.2 invalid on other grounds and therefore chose not to reach this issue below.

812-13 (Del. 1948). Article III, § 1 of the Delaware Constitution vests the "supreme executive powers of the State" in the Governor, as head of the executive branch. *Del*. *Const*. art. III, § 1. Article III, § 17 further tasks the Governor with the obligation that "[h]e or she shall take care that the laws be faithfully executed." *Del*. *Const*. art. III, § 17. *See also Schorr*, 65 A.2d at 812-13. The United States Constitution, upon which our State Constitution is patterned, *see Schorr*, 65 A.2d at 812, similarly vests executive power in the President, and under federal law, that executive power may not be transferred to entities lacking meaningful Presidential control. *See Printz v. United States*, 521 U.S. 898, 922 (1997) (invalidating interim provision of Brady Act requiring state law enforcement to perform background checks on handgun purchasers).

The D.C. Circuit Court has held that administrative subdelegations of authority to parties outside the executive branch are presumptively improper absent express legislative authorization. *See U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554, 565 (D.C. Cir. 2004) ("[T]he case law strongly suggests that subdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization."). *See also Ass'n of Am. R.R.s v. U.S. Dept. of Transp.*, 821 F.3d 19, 31 (D.C. Cir. 2016) (finding violation of due process where self-interested party (Amtrak) was delegated administrative rulemaking authority). In particular, it is impermissible to delegate "to another actor almost the entire

determination of whether a specific statutory requirement . . . has been satisfied." The D.C. Circuit Court explained its rationale:

> When an agency delegates authority to its subordinate, responsibility—and thus accountability—clearly remain with the federal agency. But when an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making. Also, delegation to outside entities increases the risk that these parties will not share the agency's "national vision and perspective," and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme. In short, subdelegation to outside entities aggravates the risk of policy drift inherent in any principal-agent relationship.

U.S. Telecom Ass'n, 359 F.3d at 565-66 (internal citations omitted).

In this case, Condition II.I.2 of the Permit constitutes an unconstitutional delegation of executive power to an outside party. To "investigate and determine" another's regulatory compliance describes quintessential law enforcement functions reserved to the executive, and there is no express legislative authorization for DNREC to make such a subdelegation. To the contrary, the General Assembly specifically reserved regulatory enforcement exclusively to DNREC. *See* 7 *Del. C.* § 6005(a) ("The Secretary shall enforce this chapter."). Absent a clear legislative authorization, DNREC may not cede its executive power by deputizing an outside party like DSWA and requiring it to enforce permits and environmental regulations against third-parties.

Condition II.I.2's requirement to "investigate and determine" impermissibly subdelegates to DSWA the onus of determining whether a specific statutory

requirement has been satisfied — here, the permit status of a third-party. Condition II.I.2 of DSWA's Transfer Station Permit should therefore be deemed unlawful.

IV. The Superior Court erroneously reversed the Board's factual determination that DSWA satisfied its permits' reporting requirements, and needlessly decided that 7 *Del. C.* § 6005(b) imposes strict liability.

A. Question Presented

Whether the Superior Court erroneously reversed the Board's factual determination that DSWA did not violate the reporting requirements of its permits, and thereby needlessly decided the mooted question of whether 7 *Del. C.* § 6005(b) imposed strict liability. A427.

B. Scope of Review

The Court's appellate review of an EAB decision matches that of the Superior Court. *See DNREC v. McGinnis Auto & Mobile Home Salvage, LLC*, 2020 WL 830058, at *3 (Del. Feb. 20, 2020). "The standard of review on appeals from EAB is limited to the correction of errors of law and a determination of whether substantial evidence exists in the record to support the Board's findings of fact and conclusions of law." *Protecting Our Indian River v. DNREC*, 2015 WL 5461204, at *6 (Del. Super. Ct. Aug. 14, 2015). *See also* 7 *Del. C.* § 6009(b) ("The Court may affirm, reverse or modify the Board's decision. The Board's findings of fact shall not be set aside unless the Court determines that the records contain no substantial evidence that would reasonably support the findings. If the Court finds that additional evidence should be taken, the Court may remand the case to the Board for completion of the record."). "Substantial evidence means such relevant evidence as

a reasonable mind might accept as adequate to support a conclusion. The Court in its appellate review does not weigh the evidence, determine questions of credibility, or make its own factual findings." *Motiva Enter. LLC v. Sec'y of Dep't of Nat. Res. & Envtl. Control*, 745 A.2d 234, 242 (Del. Super. Ct. 1999).

C. Merits of Argument

In this case, the Board concluded that DSWA did not violate its reporting requirements, and therefore DSWA's mental state with regard to the non-violation is irrelevant. The Superior Court's contrary determination is erroneous. DSWA only has liability under Section 6005(b) if a violation occurred, and since the Board determined that no violation occurred, it was unnecessary for the Court to determine whether Section 6005(b) imposes strict liability or not. S*ee* 7 *Del. C.* § 6005(b) ("Whoever ***violates*** . . . shall be punishable as follows . . .") (emphasis added).

The Board found that DSWA "could not report that G&F was using vehicles owned by an affiliate in its Annual Report because it had no knowledge until after the Report was filed." A149. This factual finding by the Board is supported by substantial evidence and is not subject to reconsideration on appeal. *See* Op. Br. App. at A145, A275. *See also Protecting Our Indian River v. DNREC*, 2015 WL 5461204, at *6 ("Absent an abuse of discretion or an error of law, if the Board's decision is supported by substantial evidence a reviewing court must sustain the

Board's decision even if such court would have decided the case differently if it had come before it in the first instance.").

According to the Superior Court, DSWA violated the reporting requirements of its permits "by failing to list all transporters that had hauled waste to and from its facilities during the previous year in accordance with Conditions III.B.2 and V.B.3." *Del. Solid Waste Auth.*, 2020 WL 495210, at 9. Contrary to the Superior Court's formulation, Condition III.B.2 of the Transfer Station Permit and Condition V.B.3 of the Landfill Permit do not require DSWA to list "all" transporters that hauled waste to or from DSWA facilities. *See* A328; A354. DSWA's permits only require it to submit an annual report to DNREC that includes "A list of transporters that hauled waste to or from the facility." *See* A488,[19] A514.[20] (It is undisputed that DSWA timely submitted its annual reports.) Based on those permit requirements, the Board correctly found that DSWA committed no violation.

The Board did not excuse DSWA from violating its permit on the basis that DSWA did not know it was violating its permit. The Board determined that the

[19] Condition III.B.2 reads: "No later than March 1st each year, the DSWA shall submit an annual report to the DNREC. This annual report shall summarize Transfer Station operations for the previous year and include . . . 2. A list of transporters that hauled waste to and from the facility during the year covered by the report." A328.

[20] Condition V.B.3 of the Landfill Permit reads: "No later than April 30th of each year, the DSWA shall submit an annual report and include the following information. . . . 3. A list of transporters that hauled waste to or from the facility." A354.

reporting requirements of Condition III.B.2 and Condition V.B.3 are satisfied when DSWA furnishes DNREC with an annual report that includes a complete list of all transporters known to have hauled waste from the facility. There was no evidence presented that DSWA withheld information from DNREC or otherwise failed to supply the transporter list with its annual report. The Board therefore reversed the Secretary's decision because DNREC failed to prove that DSWA had violated the reporting requirements.

The Board's application of Conditions III.B.2 and V.B.3 is reasonable because it avoids the absurd result of imposing liability on DSWA for failing to do what is factually impossible: to report information not within DSWA's knowledge. The Board's decision finds support in *Dover Products Co., Inv. v. Olney*, 428 A.2d 18, 19 (Del. 1981). In that case, an unknown third-party dumped a load of chicken carcasses at Dover Products Company's rendering facility. *Id.* Dover Products did not cause or authorize the dumping, but nevertheless, DNREC sued Dover Products for causing air pollution after a foul odor began to emit from the rotting carcasses. *Id.* Reversing the lower court, this Court held that Dover Products could not be liable for the odor because it neither caused nor allowed, expressly or implicitly, the initial act causing the air pollution. *Id*. In this case it was G&F that violated its permit by using CH to transport waste at PTCTS, and DSWA neither expressly nor implicitly authorized CH as a transporter, nor knew of CH's involvement, and

therefore like Dover Products, DSWA neither caused nor allowed the conditions that underly the purported violation, and DSWA cannot, therefore, be held in violation of its permit.

The Board's correct conclusion that DSWA did not violate its reporting requirements is supported by substantial evidence, and the Superior Court's erroneous contrary conclusion, which is based on an illogical reading of Condition III.B.2 and V.B.3, should be reversed.

CONCLUSION

For the reasons set forth above, the Board's decision reversing the Secretary's Order as to DSWA was free from legal error and supported by substantial evidence, and therefore this Court should affirm the EAB's and Superior Court's finding that Condition II.I.2 is invalid, and should also affirm the EAB's finding that DSWA did not violate Conditions III.B.2 and V.B.3.

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DATED: June 1, 2020