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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 Consolidated
Appellees Below, Appellants/Cross-Appellees,	)	
v.	)	Court Below–Superior Court of the State of Delaware
DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL,	)	C.A. No. K-19-05-002
Appellant Below, Appellee/Cross-Appellant.	)	

APPELLANTS/CROSS-APPELLEES GREGGO & FERRARA, INC. AND CONTRACTORS HAULING, LLC'S ANSWERING BRIEF IN OPPOSITION TO THE APPEAL OF APPELLEE/ CROSS-APPELLANT DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL AND REPLY BRIEF IN SUPPORT OF THEIR APPEAL (REVISED)

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SUMMARY OF ARGUMENT

DNREC1. The Board and Superior Court erred as a matter of law in effectively holding that the Board may apply a *de novo* standard of review when it holds the initial adversarial hearing on a Secretary's Enforcement Order. The Department maintains that this standard is contrary to the standard stated in 7 *Del.C.* §6008 that the Board's review is limited to determining whether the evidence before the Board supports the Secretary's decision. Thus, the Board erred as a matter of law in substituting its judgment for that the Secretary's where the evidence before the Board supported the Secretary's decision. This issue is addressed in Section 1 of the Department's Argument.

Denied. The Board applied the proper standard of review to the Secretary's decision. This issue is addressed in Argument I in this Answering/Reply Brief.

DNREC2. While the Superior Court correctly reversed the Board's decision rescinding the administrative penalties assessed against G&F and CH, the Department respectfully maintains that the Superior Court erred in remanding to the Board for further proceedings to consider the appropriate administrative penalties to be imposed for DSWA's, G&F's and CH's respective violations that the Board and/or Court affirmed. Under 7 *Del.C.* §6005(b)(3), the Secretary, not the Board, has the discretion to impose an administrative penalty. Furthermore, the Board's and the Court's review of the penalties imposed by the Secretary should be limited to whether the penalty imposed is consistent with §6005(b)(3). This issue is addressed in Section II of the Department's Argument.

Denied. The Board has the statutory authority to set aside the Secretary's administrative penalties. This issue is addressed in Argument II in this Answering/Reply Brief.

DNREC3. The Superior Court correctly held that "the Secretary's cost recovery decisions were not properly before the Board on appeal, and the Board did not have authority to review them." The Department,

however, maintains that it may still recover its costs in this matter upon submission of a detailed billing to G&F, CH and DSWA, and that review of the Department's cost recovery is to be in accordance with the process stated in 7 *Del.C.* §6005(c). This issue is addressed in Section III of the Department's Argument.

Denied. DNREC cannot recover costs under 7 *Del.C.* §6005(c), as the Secretary never submitted a detailed billing of expenses to G&F and Contractors, as required in Argument III in this Answering/Reply Brief.

DNREC4. The Board erred as a matter of law in holding that Condition II.I.2 is unlawful and that DNREC lacks the authority to require that DSWA ensure that waste transported from its PTCTS facility is transported by a property-permitted solid waste transporter. As the Superior Court found, DNREC has the authority to include reasonable conditions in its permits, even if the permit condition lacks an explicit regulatory antecedent. Furthermore, the Department maintains that Condition II.I.2 is a reasonable permit condition. This issue is addressed in Section IV of the Department's Argument.

This issue is between DNREC and DSWA and, therefore, no response is required from G&F and/or CH.

DNREC5. Condition II.I.2 is not unconstitutionally vague, as found by the Superior Court. Condition II.I.2 places four clear obligations on DSWA that derive directly from the statutory and regulatory requirements that solid waste may only be transported by someone holding a valid solid waste transporters permit. Furthermore, the Department maintains that a person of ordinary intelligence engaged in the heavily regulated activities of collecting, storing, and transporting solid waste can understand what Condition II.I.2 requires. Therefore, the Superior Court erred in holding that Condition II.I.2 is unconstitutionally vague. This issue is addressed in Section V of the Department's Argument.

This issue is between DNREC and DSWA and, therefore, no response is required from G&F and/or CH.

DNREC6. Condition II.I.2 is not an unconstitutional subdelegation of DNREC's enforcement authority, as Condition II.I.2 only requires DSWA to ensure that its own waste transportation activities inherent to its operation of PTCTS are conducted in compliance with Delaware's environmental statutes and the *Regulations Governing Solid Waste*. This issue is addressed in Section VII of the Department's Argument.

This issue is between DNREC and DSWA and, therefore, no response is required from G&F and/or CH.

DNREC7. The Superior Court correctly held that DSWA's lack of knowledge of Ch is no defense for its failure to list CH on its annual reports under 7 *Del.C.* §6005(b)'s strict liability standard for determining permit violations. This issue is addressed in Section VII of the Department's Argument.

Denied. The Superior Court conflates strict liability as to the violation of 7 *Del.C.* §6005 with strict liability for administrative penalties under §6005(b)(3). The issue is addressed in Argument IV in this Answering/Reply Brief.

NATURE AND STAGE OF THE PROCEEDINGS

G&F and CH rely upon the Nature and Stage of the Proceedings set forth in pages 1 to 4 of their June 1, 2020 Opening Brief (D.I. #6).

On July 31, 2020 Cross-Appellant CNREC filed its combined Opening and Answering Brief.

This is the combined Answering and Reply Brief of G&F and CH.

STATEMENT OF FACTS

G&F and CH rely upon the Statement of Facts set forth on pages 6 to 15 of their June 1, 2020 Opening Brief (D.I. #6).

ARGUMENT

I. THE BOARD APPLIED THE PROPER STANDARD OF REVIEW TO THE SECRETARY'S DECISION

A. Questions Presented

Did the Board apply the proper standard of review to the Secretary's decision?

B. Scope of Review

"This Court reviews a Superior Court ruling that, in turn, has reviewed a ruling of an administrative agency, by examining directly the decision of the agency." ***United Parcel Service v. Ryan Tibbits*, 93 A.3d 655, at *2 (Del. 2014)**. The Board decision is reviewed to determine if it is supported by substantial evidence and free from legal error. ***Id.*** "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." ***Id.*** "On appeal, this Court [does] not weigh the evidence, determine questions of credibility, or make its own factual findings." ***Id.*** Questions of law are reviewed *de novo*. ***Id.*** "Absent an error of law, [] review of a Board decision is for abuse of discretion. The Board will be found to have abused its discretion where, in the circumstances, its decision has exceeded the bounds of reason." ***Id.*** ***See also, Christman, M.D. v. State of Delaware Dept. of Health and Social***

***Services*, 99 A.3d 226, at *2 (Del. 2014).** "Substantial evidence is more than a scintilla and less than a preponderance." ***Richardson v. Board of Pension Trustees*, 170 A.3d 778, at *2 (Del. 2017)** (citation omitted). Issues of statutory construction and interpretation are reviewed *de novo*. ***CML V, LLC v. Bax*, 28 A.3d 1037, 1040 (Del. 2011)** (citation omitted).

C. Merits of Argument

Appellee/Cross-Appellant, Delaware Department of Natural Resources & Environmental Control's (hereinafter, "DNREC") primary argument in its Answering/Opening Brief is that the Environment Appeals Board (hereinafter, "Board") applied the incorrect standard of review when reviewing the Secretary's decision. DNREC argues that "the appropriate standard of review that the Board was to apply to review the Secretary's Orders was whether the Secretary's decisions were supported by the evidence on the record before the Board." DNREC's Open./Answ. Br. at 18-21. DNREC further argues that just as the Superior Court cannot substitute its judgment for that of the Secretary's, neither can the Board do so. *Id.* at 18.

The standard of review when the Board reviews a Secretary's order is set forth in 7 *Del. C.* §6008(b), while the Superior Court's standard of review is set forth in case precedent (see Scope of Review Section above)

and 7 *Del. C.* §6009(b) which states that 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."

DNREC's argument with respect to the standard of review on appeal to the Board conflates the appellant's "burden of proof" with the Board's "standard of review" under 7 *Del. C.* §6008(b). Section 6008(b) states in pertinent part that the "burden of proof is upon the appellant to show that the Secretary's decision is not supported by the evidence on the record before the Board. The Board may affirm, reverse or remand with instructions any appeal of a case decision of the Secretary." The first sentence sets forth the burden of proof, while the second sentence sets forth the standard of review. Burden of proof is defined as a "party's duty to prove a disputed assertion or charge," while standard of review is defined as the "criterion by which an appellate court exercising appellate jurisdiction measures the constitutionality of a statute or the propriety of an order, finding, or judgment entered by a lower court." ***Black's Law Dictionary*, (8th Ed. 2004)**.

The Board heard oral argument (none was presented before the Secretary) and heard testimony from nine witnesses who did not testify before the Secretary. The Board also considered the chronology of events, written submissions of the parties, and oral argument. The Board reversed the Secretary by a vote of 5-0. Implicit within the Board's decision is that the appellants, DSWA, G&F, and CH, met their burden of proof - considering all the additional evidence that was presented before the Board, which the Secretary did not consider – to show that the Secretary's decision was not supported by substantial evidence. The Board did not substitute its judgment for that of the Secretary's, as argued by DNREC, rather, the Board found that the Secretary's decision is not supported by the evidence on the record before the Board. The record before the Board was more expansive than that before the Secretary, and in considering that additional evidence, the appellants below met their burden of proof.

Furthermore, Section 6008(b) does not state that the Board must give any deference to the Secretary's decision, only that the Board may affirm, reverse, or remand. Contrastingly, with regard to appeals of regulations under 7 *Del. C.* §6008(c), the "board shall take due account of the Secretary's experience and specialized competence and of the purposes of this chapter in making its determination." §6008(b) contains no such

language, therefore it is logical to conclude that the absence of the deferential language in §6008(b) is purposeful and means that the Board is not explicitly required to give deference to the Secretary's decision when considering an appeal under §6008(b).

DNREC's next argument is that the Superior Court's holding is misplaced, as it relied on *dictum* in ***Tulou v. Raytheon Serv. Co.*** and is contrary to 7 *Del. C.* §6008(b)'s statutory language. DNREC's Open./Answ. Br. at 19-20. **659 A.2d 796, 805 (Del. Super. March 6, 1995)**. By way of review, ***Tulou*** involved what is referred to as a "two-hearing" case, in other words, where an adversarial hearing takes place before the Secretary and the Board. The Secretary held a hearing, but on appeal to the Board, the Board heard testimony from a witness that was barred from testifying before the Secretary. ***Id.* at 801**. The ***Tulou*** Court held that in a two-hearing case, the Board must give the Secretary's decision some deference, since the Board is holding the second hearing. ***Id.* at 804**. The Court also stated, in *dicta*, that where the first full hearing is before the Board, "there is less apparent need for explicit deference to the Secretary's expertise." ***Id.* at 805**.

DNREC argues that §6005(b)(3) provided DSWA, G&F, and CH the choice of having an initial hearing before the Secretary before appealing the Secretary's Orders to the Board, therefore "§6008 cannot mean that that the

Board proceeding becomes a trial *de novo* as G&F and CH argue in their Opening Brief." DNREC's Open./Answ. Br. at 21. G&F/CH did not discuss the *de novo* standard of review in their Opening Brief, however G&F/CH did argue that the Board is not explicitly required under §6008(b) to give deference to the Secretary's decision where the first adversarial hearing is before the Board.

As recognized by the Superior Court in this case, the ***Tulou*** Court's review of the statutory framework applicable in this dispute is sound and instructive in resolving these arguments. The ***Tulou*** Court began its analysis by recognizing that 6008(b), unlike 6008(c), does not require the Board to "take due account of the Secretary's experience and specialized competence." ***Id.* at 804**. However, ***Tulou*** recognized that when a full adversarial hearing takes place before the Secretary, appeals under 6008(b) are to be given "some" deference by the Board, since the Board is holding a second hearing. ***Id.* at 805**. The Court found that 6008(b) is ambiguous and therefore proceeded to interpret the statute to effectuate the legislative intent. It is helpful to review ***Tulou's*** analysis and statutory construction:

> While this case involves an appeal of one of the two types of Secretarial decisions, namely, a permit decision, the matter came to the Board after a full adversarial hearing. Therefore, § 6008(b) is not only invoked on appeals of permit and enforcement decisions of the Secretary, it is invoked when there has not been a hearing before the Secretary and where there has been a hearing. <u>However, the statutory</u>

language on its surface draws no distinction between the standards to be applied where there has or has not been a hearing. Logically, however, the same rules cannot apply.

In addition, § 6008(b) needs to be interpreted in drawing this distinction to avoid the absurd result of treating initial Board hearings the same as where the Board holds the second hearing. This Court is compelled to interpret statutes to avoid absurd results.

Since § 6008(b), as currently written, encompasses circumstances where the initial full adversarial hearing is before the Board, it is readily evident why the Board must be allowed to receive additional evidence. Also, in situations where the Board provides the first hearing, there is less apparent need for explicit deference to the Secretary's expertise.

Section 6008(c) involving appeals to the Board of regulation decisions of the Secretary necessarily contemplates appeals after the Secretary has held full hearings. Since regulations can often involve technical matters and since the Board is holding a second hearing, it is more apparent why § 6008(c) explicitly requires the Board to defer to the Secretary's expertise and does not contain the broader discretion found in § 6008(b) to receive and consider additional evidence.

Even though the same explicit statutory language is absent in § 6008(b), in cases like this involving the Board conducting the second hearing, the application of § 6008(b) to a two-hearing case cannot be identical to the initial hearing circumstances of *T.V. Spano*. Therefore, by analogy, § 6008(c) provides a modicum of guidance in delineating procedures and guidelines between an initial hearing case and a two-hearing case.

The Court is mindful that someone might say that using § 6008(c) as even a small guide in this matter and/or saying § 6008(b), in its application, must treat initial hearings differently than second hearings amounts to judicial legislation. By lumping together two distinct settings, the statute becomes ambiguous and it then becomes incumbent on the Court to effectuate the legislative intent.

> Even though the Board heard this appeal under § 6008(b), the Secretary had a full adversarial proceeding and considered post-hearing evidence. The record the Board starts with in a circumstance such as this is necessarily more complete and represents an effort by both parties to make their case before the Secretary. Additionally, this proceeding involved the submission to and consideration by the Secretary of a fair amount of technical evidence.
>
> Accordingly, where the Secretary, as a person necessarily holding technical expertise, makes a decision involving consideration of technical evidence following an adversarial proceeding, the Board must give the Secretary's decision some deference, since the Board is holding a second hearing. It is impossible to quantify how much deference is due without more explicit statutory language, nevertheless, such deference must be given.

The Superior Court in the case *sub judice* was persuaded by the ***Tulou's*** construction of the governing statutes. ***DNREC v. DSWA*, [2020 WL 495210, at *8 (Del. Super. Jan. 29, 2020)]**. Here, where the initial adversarial hearing was before the Board, the Board was not required to provide explicit deference to the Secretary's expertise, and therefore "the Board did not commit an error of law in reviewing the Secretary's decision that DSWA had violated Conditions III.B.2 and V.B.3." ***Id.*** The appellants before the Board (DSWA, GF, and CH) met their burden to prove that the Secretary's decision was not supported by the evidence on the record before the Board.

II. THE BOARD HAS THE STATUTORY AUTHORITY TO SET ASIDE THE SECRETARY'S ADMINISTRATIVE PENALTIES.

A. Questions Presented

Did the Board Err When it Rescinded the Secretary's Imposition of Administrative Remedies?

B. Scope of Review

These Appellants respectfully submit that the scope of review is identical to that set forth in Argument I.B.

C. Merits of the Argument.

The Superior Court's standard of review when reviewing an appeal from the Board is set forth in 7 *Del. C.* §6009(b) which states that 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 record 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." The cases cited by DNREC in Section II of its Answering/Opening Brief do not address the level of deference the Board must give the Secretary under §6008(b). Rather, they involve the level of deference the Superior Court must give to an administrative agency's decision on appeal, however under different statutory schemes than the case *sub judice*. Here, this Court

directly reviews the Board's decision to determine if it is supported by substantial evidence and free from legal error. ***Ryan Tibbits*, 93 A.3d 655, at *2.**

Implicit within the Board's decision is that the appellants met their burden of proof - considering all the additional evidence that was presented before the Board, which the Secretary did not hear (including testimony from nine witnesses and oral argument) – to show that the Secretary's decision was not supported by substantial evidence. The Board did not substitute its judgment for that of the Secretary's, as argued by DNREC, rather, the Board found that the Secretary's decision is not supported by the evidence on the record before the Board.

As explained herein, the Board's decision to reverse the administrative penalties is based on substantial evidence that would reasonably support the findings and is within the statutory confines. *See* 7 *Del. C.* §6005(b). §6005(b)(3) states that, "[a]ssessment of an administrative penalty shall be determined by the nature, circumstances, extent and gravity of the violation, or violations, ability of the violator to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation and such other matters as justice may require." The Board considered these factors and held that, as

to G&F, the violation was a result of "understandable oversight" and no environmental harm or damage occurred. EAB Appeal No. 2018-08, p. 11. As to CH, the Board considered the "innocent nature" of the offense and the fact that no environmental harm or damage occurred. Therefore, this Court should affirm the Board's decision. EAB Appeal No. 2018-08, p. 12.

The cases cited by DNREC to support its argument that the Board (and also the Superior Court) applied the incorrect standard of review when it reversed the Secretary's imposition of administrative penalties are inapposite to this case, as they involved differing statutory schemes and directives. ***See Kirpat, Inc. v. Delaware Alcoholic Beverage Control Com'n*, [1998 WL 731577 (Del. Super. Mar. 31, 1998)]** (appeal from the Alcoholic Beverage Control Commission); ***Jordan v. Smyrna School Dist. Bd. of Educ.*, [2006 WL 1149149 (Del. Super. Feb. 15, 2006)]** (appeal from State Board of Education); ***Johns v. Council of Delaware Ass'n of Professional Engineers*, [2004 WL 1790119 (Del. Super. July 27, 2004)]** (appeal from Council of Delaware Association of Professional Engineers); ***Weymouth v. Delaware State Bd. of Examiners in Optometry*, 514 A.2d 1119 (Del. Super. 1985)** (appeal from Delaware State Board of Optometry).

The Superior Court correctly interpreted the applicable statutes, including 7 *Del. C.* §6008. The Court was also persuaded by the ***Tulou***

Court's interpretation of the governing statutes, and agreed that where the initial adversarial hearing is before the Board, the Board is not required to provide explicit deference to the Secretary's expertise. ***DNREC*, [2020 WL 495210, at *8]**. ***Tulou*** does not provide the standard of review for the Board's review of the Secretary's imposition of administrative penalties, as argued by DNREC. Rather, the applicable statutes provide the standard of review, and ***Tulou*** simply illustrates the proper construction of those statutes. Regardless of ***Tulou***, G&F and CH met their burden of proof to show that the Secretary's decision is not supported by the evidence on the record before the Board.

III. DNREC CANNOT RECOVER COSTS UNDER 7 *DEL. C.* §6005(C), AS THE SECRETARY NEVER SUBMITTED A DETAILED BILLING OF EXPENSES TO G&F AND CONTRACTORS, AS REQUIRED BY §6005(C)(1)

A. Questions Presented

Can DNREC recover costs when the Secretary did not submit a detailed billing of expenses?

B. Scope of Review

These Appellants respectfully submit that the scope of review is identical to that set forth in Argument I.B.

C. Merits of the Argument

DNREC continues to argue that it can recover costs in this case despite clear legal precedent to the contrary, which it fails to address or distinguish. This issue is squarely addressed in ***Garvin v. Booth*, [2019 WL 3017419, at *6 (Del. Super. July 10, 2019)]**. ***Booth*** clearly holds that where the Secretary fails to provide a detailed billing to the liable person (here G&F and CH), DNREC may not recover its costs. DNREC's failure to distinguish or address ***Booth*** in its Opening/Answering Brief is evidence that ***Booth*** squarely addresses this issue, and DNREC is foreclosed from seeking cost recovery. Further, DNREC waived its right to recover costs at a later time by failing to brief or argue this point before the Superior Court. Supr.Ct.R. 8. "It is settled Delaware law that a party waives an argument by

not including it in its brief." ***Emerald Partners v. Berlin*, [2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003)]** (citation omitted). Principals of fairness and judicial economy dictate that the Secretary should have submitted the detailed billing of expenses within a reasonable time after the Secretary's decision in November of 2018. Allowing DNREC to seek costs after resolution of the case *sub judice* would create a bifurcation of this action and prevent the timely administration of justice. Therefore, DNREC is foreclosed from seeking cost recovery regardless of whether the Board had jurisdiction to review the Secretary's penalties under 6005(c).

In the alternative, G&F and CH argue that it is unclear whether §6005(c)(1)-(2) excludes appeal of administrative cost recovery under §6008, therefore it is feasible that the Board had jurisdiction to review the Secretary's Orders with regard to costs. DNREC argues that administrative cost recovery is excluded from the Board's purview under §6005(c)(2)'s language stating, "[t]his subsection shall not be affected by the appeal provisions of §6008 of this title." DNREC's Open./Answ. Br. at 28. G&F and CH submit that this language can be interpreted to allow an election of remedies, whereby a liable party can appeal cost recovery through §6005(c)(1)-(2) *or* under §6008. G&F and CH agree with the Board that 7

Del. C. §6008 does not limit the Board in terms of addressing the assessment of cost recovery in a DNREC enforcement action.

The view that a liable party is entitled to an election of remedies is buttressed by the Secretary's Orders in 2018-WH-0067 and 2018-WH-0068. On page 4 of both Opinions under the heading PUBLIC HEARING AND APPEAL RIGHTS, the Secretary states that:

> "[t]his Assessment and Order affect Respondent's legal rights and is effective and final upon receipt by Respondent. Pursuant to Section 6008 of Title 7 of the Delaware Code, any person whose interest is substantially affected by this action of the Secretary may appeal to the Environmental Appeals Board with **20 days** of the receipt of the Assessment and Order. In the alternative, Respondent may, pursuant to 7 *Del. C.* §6005(b)(3), request a public hearing on the Assessment and Order within **30** days of receipt of the Assessment and Order. A public hearing pursuant to 7 *Del. C.* §6005(b)(3) would be conducted pursuant to 7 *Del. C.* §6006, and the Secretary's order following the hearing would be subject to appeal, pursuant to 7 *Del. C.* §6008, by any person substantially affected." Secretary's Order #2018-WH-0067 and #2018-WH-0068, p. 4.

IV. THE SUPERIOR COURT CONFLATES STRICT LIABILITY AS TO THE VIOLATION OF 7 *DEL C.* §6005 WITH STRICT LIABILITY FOR ADMINISTRATIVE PENALTIES UNDER §6005(B)(3)

A. Questions Presented

Did the Superior Court conflate strict liability as to the violation of 7 *Del.C.* §6005 with strict liability for administrative penalties under 7 *Del.C.*§6005(B)(3)?

B. Scope of Review

These Appellants respectfully submit that the scope of review is identical to that set forth in Argument I.B.

C. Merits of Argument

DNREC's Answering/Opening Brief fails to address G&F and CH's strict liability argument set forth in G&F and CH's Opening Brief and only addresses its argument towards DSWA. Therefore, DNREC waives any argument against G&F and CH regarding whether G&F and CH are strictly liable for violations of the applicable regulatory and statutory provisions, and administrative penalties. A party is required to raise all arguments in their opening brief. ***Polaski v. Dover Downs, Inc.*, 49 A.3d 1193, at *2 (Del. May 29, 2014)**. "It is settled Delaware law that a party waives an argument by not including it in its brief." ***Emerald Partners v. Berlin*, [2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003)]** (citation omitted).

However, in the alternative that this Court finds that DNREC did not waive this argument by failing to including it in its Answering/Opening Brief, it is clear that DNREC's arguments conflate strict liability as to the violation of 7 *Del.C.* §6005 with strict liability for administrative penalties under 7 *Del.C.*§6005(b)(3).

To review, the Superior Court held that "G&F and CH are strictly liable for their violations of applicable regulatory and statutory provisions connected with CH's transport of solid wastes without a permit." ***DNREC v. DSWA, G&F, CH*, [2020 WL 495210, at *10]**. However, the Superior Court erred as a matter of law when it proceeded to hold that "given the directive of Section 6005(b) that such strict liability violations 'shall be punishable' by the penalties set forth in that subsection, the Court is concerned that the Board's conclusion that no penalties were appropriate was not well-considered." ***Id.*** The Superior Court reversed the Board's determination that no administrative penalties should be imposed upon G&F and CH and remanded to the Board for consideration of the appropriate administrative penalties to be imposed upon G&F and CH for the statutory and regulatory provisions they violated. ***Id.***

DNREC argues that the Board erred by "impermissibly adding a 'state of mind' element to Delaware's strict liability statute." DNREC's

Open./Answ. Br. At 56. As discussed more thoroughly in G&F and CH's Opening Brief, the administrative penalty provision in §6005(b)(3) is permissive and discretionary, as indicated by the words "may" and "discretion" and the fact that the Secretary is empowered to impose no penalty at all. There is no requirement to impose an administrative penalty, even if one is found liable for a violation. This holds true even if the applicable regulatory provisions are considered to impose strict liability.

Because the Board was not required under 7 *Del. C.* §6008(b) (and ***Tulou's*** interpretation thereof) to give deference to the Secretary's decision where the initial adversarial hearing is before the Board, the Board did not err when it reversed the administrative penalties imposed on G&F and CH. The appellants before the Board (DSWA, GF, and CH) met their burden to prove that Secretary's decision to impose administrative penalties was not supported by the evidence on the record before the Board. Therefore, this Court should reverse the Superior Court's holding that G&F and CH are strictly liable for administrative penalties, and affirm the Board's decision which properly applied 7 *Del.C.*§6005(b)(3).

CONCLUSION

Based upon the reasons and authorities set forth in the Opening, Answering and Reply Briefs of Appellants Greggo and Ferrara and Contractors Hauling, the Opinion of the Superior Court should be reversed and this case should be remanded for entry of an Order affirming the decision of the Environmental Appeals Board.

Respectfully submitted,

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