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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
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
SUPPLEMENTAL SUR-REPLY BRIEF ON APPEAL

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This is the Delaware Solid Waste Authority's (DSWA) Supplemental Sur-Reply Brief, and it is the final installment of briefing for the interlocutory appeal and cross-appeal with respect to the parties, Appellant, Cross-Appellee DSWA and Appellee, Cross-Appellant the Delaware Department of Natural Resources and Environmental Control (DNREC).

By way of history, DSWA filed its Opening Brief on June 1, 2020 (D.I. 9). DNREC then filed its (corrected) Consolidated Answering and Opening Brief on August 5, 2020[1] (D.I.17). Afterwards, DSWA filed its Reply Brief and Answering Brief on September 18, 2020 (D.I 19). And most recently, DNREC filed its Consolidated Sur-Reply and Reply Brief on October 9, 2020 (D.I. 22).

Pursuant to a Stipulation of the parties, as confirmed by Order of the Court dated August 11, 2020, DSWA reserved the right to file a Supplemental Sur-Reply Brief if DSWA believed that DNREC's Consolidated Sur-Reply and Reply Brief exceeded its allowable scope. *See* Order, Seitz, C.J. ¶ 1(Mar. 18, 2020). After reviewing DNREC's Consolidated Sur-Reply and Reply Brief, DSWA believes DNREC's recent briefing exceeded the allowable scope with respect to arguments

[1] By Stipulation of the Parties and Order of the Court dated August, 11, 2020, an extension of the briefing schedule was granted. *See* Order, Seitz, C.J. (Mar. 18, 2020) (D.I. 15).

presented in Parts IV and V because these arguments relate to matters raised by DSWA in its Opening Brief. Therefore, in accordance with the August 11, 2020 Stipulation and Order, DSWA invokes its right to submit this Supplemental Sur-Reply Brief, and will hereby respond only to those arguments raised by DNREC in Parts IV and V of its Consolidated Sur-Reply and Reply Brief.

ARGUMENT

IV. Condition II.I.2 Is Not A Valid Permit Condition.

Part IV of DNREC's Consolidated Sur-Reply and Reply Brief compresses what were three separate argument sections in DSWA's Opening Brief and DNREC's prior Consolidated Answering and Opening Brief. *Compare* DNREC Sur-Reply & Reply Br., D.I. 22, at 13-16, *with* DSWA Op. Br., D.I. 9, at 14-31, *and* DNREC Ans. & Op. Br., D.I. 19, at 31-53. Originally presented in DSWA's Opening Brief as Parts I, II, and III, these three argument sections addressed the impropriety of DSWA's Transfer Station Permit Condition II.I.2. Broadly stated, the arguments were (I) that Condition II.I.2 of the Transfer Station Permit violates 7 *Del. C.* § 6003(c); (II) that Condition II.I.2 is unconstitutionally vague and unreasonable; and (III) that Condition II.I.2 attempts an unconstitutional subdelegation of DNREC's executive power. *See* DSWA Op. Br., D.I. 9, at 14-31. DNREC offered its answer to DSWA's arguments in its Consolidated Answering and Opening Brief, but has now mounted yet another attack in Part IV of DNREC's Consolidated Sur-Reply and Reply Brief.

While DNREC uses Part IV of its Consolidated Sur-Reply and Reply Brief to revisit the same three issues identified above, DNREC's current briefing offers only truncated arguments that essentially rehash meritless positions taken in prior briefing. In this Supplemental Sur-Reply Brief, DSWA responds to DNREC's

reanimated arguments by subdividing the response to Part IV into categories consistent with the three issue sections from DSWA's prior briefing.

A. Condition II.I.2 Violates 7 *Del. C.* § 6003(c).

For reference, the pertinent provisions of Condition II.I.2 are set forth below:

> 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.

A324. As discussed in earlier briefing, the General Assembly imposed express statutory limitations on DNREC's permitting power by providing the following directive in 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*** . . . ." 7 *Del. C.* § 6003(c) (emphasis added).

In its Reply and Sur-Reply briefing, DNREC makes two alternative arguments as to why Condition II.I.2 passes muster under 7 *Del. C.* § 6003(c). DNREC's initial argument is essentially that the express restrictions imposed by § 6003(c) should yield to efforts that DNREC proclaims are intended to further its general policy objectives of preserving natural resources "for the welfare of the State and its inhabitants." *See* DNREC Sur-Reply & Reply Br., D.I. 22, at 13 (citing 7 *Del. C.* § 6020). In DNREC's view, those statutory restrictions in § 6003(c) should be

"liberally construed," *i.e.*, ignored or significantly relaxed whenever DNREC claims a permit condition is necessary to accomplish its policy objectives. *See id.* at 13 (arguing for supremacy of general policy directives over specific application of statutory limitations). According to DNREC, applying § 6003(c)'s express terms amounts to "hyper-technical" statutory interpretation. *See id.*

DNREC's argument derives from the misguided conclusion that *Formosa Plastics Corp. v. Wilson*, 504 A.2d 1083 (Del. 1986), overrides the express dictates of 7 *Del. C.* § 6003(c) and grants DNREC power to impose virtually any permit condition so long as it meets an undefined and elastic standard of "reasonableness." *See* DSWA Reply & Ans. Br., D.I. 19, at 18-24 (discussing DNREC's erroneous application of *Formosa*). As discussed in prior briefing, *Formosa* does not override 7 *Del. C.* § 6003(c). Under § 6003(c), DNREC permits and permit conditions must issue in accordance with duly-promulgated antecedent regulations. 7 *Del. C.* § 6003(c). *See also* DSWA Op. Br., D.I. 9, at 14-19 (discussing § 6003 requirements). DNREC's position, which seeks to uncouple permits from duly promulgated regulations, exemplifies the sort of administrative excess that § 6003(c) seeks to curb.

One reason DNREC would want to uncouple permits from antecedent regulations is that DNREC can avoid the inconvenience of APA-compliant regulation promulgation and instead create backdoor regulations through individual

permit conditions. Fortunately, § 6003(c) insulates the regulated community from DNREC's short-circuiting of the regulatory process. Tethering permits to duly-promulgated antecedent regulations ensures that the due process protections afforded by the APA are not lost in the subsequent permitting scheme. *See* DSWA Op. Br., D.I. 9, at 17-18 (discussion APA due process safeguards).

The limitations imposed by § 6003(c) are clear and mandatory and do not yield to DNREC's subjective notions of preserving the environment or some ad-hoc standard of reasonableness. In this case, Condition II.I.2 of DSWA's Transfer Station Permit has no regulatory antecedent, as has been explained in DSWA's previous briefing. *See* DSWA Op. Br., D.I. 9, at 14-16 (discussing absence of duly promulgated regulation supporting "investigate and determine" provision of Condition II.I.2). *See also* DSWA Reply & Ans. Br., D.I. 19, at 21-24 (discussing DNREC's "ensure" formulation, its lack of a duly promulgated regulation, and its inconsistency with existing regulation). Condition II.I.2 is therefore statutorily invalid and unenforceable.

DNREC offers a secondary, backup argument for why Condition II.I.2 is valid under § 6003(c). For this argument, DNREC agrees that permits must issue in accordance with duly promulgated regulations—as § 6003(c) plainly requires—but that its Condition II.I.2 remains valid because it was issued in accordance with duly

promulgated regulations. *See* DNREC Sur-Reply & Reply Br., D.I. 22, at 13-14. DNREC's assertion is meritless.

As a preliminary matter, DNREC continues to maintain its incorrect "ensure" formulation of Condition II.I.2, *i.e.*, DNREC again claims that Condition II.I.2 requires DSWA to "ensure" that no waste transporter transport waste from the transfer station without a transfer permit, and that if any transporter does so, then DSWA is strictly liable for that occurrence. *See id.* Unfortunately for DNREC, these terms do not actually exist under Condition II.I.2 as issued. They represent what DNREC would like Condition II.I.2 to require, but DNREC's interpretation is contrary to law and contextually incompatible. *See* DSWA Reply & Ans. Br., D.I. 19, at 27-31 (discussing DNREC's flawed "ensure" formulation). As was more thoroughly discussed in DSWA's Reply & Answering Brief, there is no "ensure" requirement in Condition II.I.2, and DSWA's obligations under Condition II.I.2 are clearly conditioned on DSWA's knowledge, and thus the Permit does not impose strict liability. *See id.*

Notwithstanding all logic and evidence to the contrary, as well as the Superior Court's rejection of the interpretation, DNREC maintains its "ensure" formulation is the controlling interpretation of Condition II.I.2. Thus, working from its flawed "ensure" interpretation, DNREC scours the *Regulations* in a strained attempt to find anything that might satisfy § 6003(c)'s requirements. *See* DNREC Sur-Reply &

Reply Br., D.I. 22, at 13-14. The following is the result of DNREC's tenuous endeavor.

Briefly stated, DNREC identified a couple of existing ministerial regulations (*e.g.*, regarding the length of time waste can stay at the transfer station, and a requirement to maintain operable equipment) and then cobbled those together with the unrelated regulation for transport permits in order to claim that their amalgamation constitutes the "duly promulgated regulation" necessary to justify DNREC's impressment of DSWA to act as insurer and policer of waste transport activities.

DNREC's convoluted approach is the antithesis of due process and represents a backdoor strategy for non-APA regulation promulgation. The fact is that no existing regulation authorizes DNREC to impose an obligation on a permittee to "ensure" that a third party has whatever permits they might be required to hold. Nor does any existing regulation impose strict liability on a transfer station operator for the permitting violation of a third party. DNREC is attempting to use the permitting process to establish new categories of regulatory obligations without first authorizing them through an APA-compliant process of promulgation. This is a violation of § 6003(c), and for that reason, Condition II.I.2 and DNREC's "ensure" formulation are invalid.

B. Condition II.I.2 Is Unconstitutionally Vague and Unreasonable.

As DSWA discussed in its Opening Brief, the "investigate and determine" condition of Condition II.I.2 of the Transfer Station Permit lacks any meaningful standards to guide DSWA's compliance or DNREC's enforcement, and has led to arbitrary and erratic enforcement positions taken by DNREC throughout this case. *See* DSWA Op. Br., D.I. 9, at 20-24. This is simply another unfortunate consequence of DNREC failing to ground Condition II.I.2 in duly promulgated regulations, and DNREC has compounded that confusion by failing to make any effort to train DSWA on what the Permit's "investigate and determine" provision actually requires, and by failing to provide tools necessary for DSWA to achieve compliance. *See* DSWA Op. Br., D.I. 9, at 26; DSWA Reply & Ans. Br., D.I. 19, at 32-34.

In its sur-reply, DNREC tries to cure the infirmities of its "investigate and determine" provision by reading in a super-requirement that obligates DSWA to "ensure" that no waste transporter transport waste from the transfer station without a transfer permit. *See* DNREC Ans & Op. Br., D.I. 17, at 35, 41-50. However as noted above, DNREC's "ensure" formulation has no basis in duly promulgated regulation. *See* DSWA Reply & Ans. Br., D.I. 17, at 21-24. Moreover, the text of the Transfer Permit does not contain the "ensure" requirement as DNREC has stated it, and in fact DNREC's interpretation contradicts the regulatory *status quo* under the *Regulations*, which squarely place the responsibility for transport permits on

waste transporters and not transfer station operators. *See* DSWA Reply & Ans. Br., D.I. 19, at 28-31. Furthermore, as the Superior Court correctly pointed out, DNREC's current "ensure" formulation entirely confounds the expressly conditional obligation that DSWA "investigate and determine" a transporter's permit only upon a suspicion of invalidity. *See* DSWA Reply & Ans. Br., D.I. 19, at 29-30.

DNREC's reimagining of Condition II.I.2 is especially troubling because it threatens to impose the onerous burden of strict liability on the basis of unwritten terms without duly promulgated antecedent regulations. As such, DNREC's "ensure" formulation not only fails to solve the vagueness problems of Condition II.I.2, if anything, it intensifies them. For all of the reasons expressed in DSWA's previous briefing, the Court should affirm the Superior Court's determination that Condition II.I.2 is unconstitutionally vague and therefore invalid.

C. Condition II.I.2 Unconstitutionally Delegates DNREC Authority.

DNREC continues to claim that its "investigate and determine" provision of Condition II.I.2 of DSWA's Transfer Station Permit does not improperly subdelegate DNREC's exclusive regulatory enforcement authority under Chapter 60. *See* DNREC Sur-Reply & Reply Br., D.I. 22, at 16. DNREC claims that Condition II.I.2 simply makes DSWA responsible for its own conduct. *See id.*

Paradoxically, however, DNREC also argues that Condition II.I.2 obligates DSWA to take "affirmative steps" to investigate and determine the validity of

another party's transport permit, *see* DNREC Ans. & Op. Br., D.I. 17, at 44, and that DSWA will be "held to account" if it fails to do so. *See* DNREC Sur-Reply & Reply Br., D.I. 22, at 14. DNREC's recent briefing does not attempt to reconcile this obvious contradiction. DNREC instead argues that the "investigate and determine" provision is justified because "waste transportation is an integral part of managing a transfer station . . . ." *See* DNREC Sur-Reply & Reply Br., D.I. 22, at 16.

As discussed in Part IV.A, *supra*, as well as in DSWA's other briefing, there are no regulations establishing DSWA's obligation to "investigate and determine" another's regulatory compliance, just as no existing regulations hold DSWA strictly liable for another party's regulatory breach. But even if a regulation existed that did authorize DNREC to task DSWA with investigating and determining another party's permits, such regulation would nevertheless fail as unconstitutional.

The General Assembly did not empower DNREC to delegate enforcement tasks to DSWA or any other regulated entity, and regulations or permit conditions purporting to do so run afoul of the enforcement exclusivity provision of 7 *Del*. *C*. § 6005(a) (charging the DNREC Secretary alone with enforcement of Chapter 60). In the absence of express legislative authorization, any delegation of Chapter 60 regulatory enforcement responsibilities (*e.g.*, by affirmatively tasking DSWA to investigate another's permit compliance) constitutes an impermissible delegation of

executive authority and must be held unconstitutional. *See* DSWA Op. Br., D.I. 9, at 28-31; DSWA Reply & Ans. Br., D.I. 19, at 32-34.

V. DSWA Did Not Violate Its Reporting Requirements.

DSWA's Permits require it to report "[a] list of transporters," which the Environmental Appeals Board has reasonably interpreted as requiring DSWA to disclose its knowledge of who transported waste from its facilities. *See* DSWA Op. Br., D.I. 9, at 34-36; DSWA Reply & Ans. Br., D.I. 19, at 35-38. DSWA reported all known transporters, and that is why the Board concluded that no reporting violation occurred. The Board interpreted the reporting requirements in a reasonable manner consistent with the conventional utility of a reporting requirement, which ordinarily is for the purpose of disclosing information known to the reporter. This commonsense conceptualization is fully supported by the terms of the reporting requirements as written, which merely requires the transfer station operator to provide "[a] list of transporters that hauled waste to and from the facility . . . ." *See* A328, A354

DNREC now argues for something more than what is written in the Permits by demanding that this Court interpret DSWA's reporting requirements expansively. DNREC wants to transform the simple disclosure requirements into an affirmative investigatory obligation similar to the constitutionally infirm "investigate and determine" provision of Condition II.I.2. There is no reason for the Court to indulge DNREC's request.

The Permits' conditions should be interpreted as they were written and not how DNREC now whishes they were written. DNREC drafted the permit conditions and has tremendous leverage to impose the terms that it desires. If DNREC wanted more exacting reporting standards, such as by including intensifying modifiers like "all" or "complete," *see* DNREC Sur-Reply & Reply Br., D.I. 22, at 18, then DNREC could have and should have done so when issuing the Permits.

Furthermore, if 7 *Del. C.* § 6005(b) does impose strict liability, as DNREC claims it does, then enforcing strict liability through an unreasonably expansive reading of DSWA's simple reporting requirements will result in needlessly punitive consequences against DSWA for actions that G&F took independent of DSWA and without DSWA's knowledge or consent, express or implied. The Court should reject this draconian outcome championed by DNREC and instead uphold the Board's reasonable conclusion that DSWA complied with its Permits' conditions by reporting all known waste transporters on its annual reports.

CONCLUSION

For the reasons set forth above and in DSWA's Opening Brief and combined Reply Brief and Answering Brief, the Court should affirm the EAB's decision reversing the Secretary's Order as to DSWA, and hold that Condition II.I.2 is invalid and that substantial evidence supports the EAB's finding that DSWA committed no violation of the reporting requirements of its Permits. The Court should therefore reverse the Superior Court's Order remanding this case to the Board for determination of a penalty assessment.

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