



**IN THE SUPREME COURT OF THE
STATE OF DELAWARE ON APPEAL FROM THE SUPERIOR COURT IN
AND FOR KENT COUNTY**

STATE OF DELAWARE)
DEPARTMENT OF)
NATURAL RESOURCES AND)
ENVIRONMENTAL CONTROL,)
)
Plaintiff/Appellant,)
)
v.)
)
McGINNIS AUTO & MOBILE)
HOME SALVAGE, LLC,)
)
Defendant/Respondents.)
)

No. 139, 2019

CORRECTED OPENING BRIEF OF THE APPELLANT
DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL
CONTROL

/s/ Ralph K. Durstein, III
Ralph K. Durstein III (ID #0912)
Deputy Attorney General
Department of Justice
State of Delaware
102 W. Water St.
Dover, DE 19901
(302) 577-8510
Attorney for Appellant

Dated: June 12, 2019

TABLE OF CONTENTS

NATURE OF THE PROCEEDINGS.....1

SUMMARY OF ARGUMENT.....2

STATEMENT OF FACTS.....3

ARGUMENT

 I. DNREC PROPERLY EXERCISED THE CEASE AND DESIST
 POWER

 A. Question Presented.....9

 B. Scope of Review.....9

 C. Argument.....10

CONCLUSION.....27

TABLE OF CITATIONS

Cases

<i>DNREC v. McGinnis</i> , No. 93, 2019	1
<i>Formosa Plastics Corp. v. Wilson</i> , 504 A.2d 1083 (Del. 1986).....	passim
<i>James Julian, Inc. v. State of Delaware</i> , 1991 WL 2245757 (Del.Ch. Oct. 29, 1991)	20
<i>Motiva Enterprises LLC v. DNREC</i> , 745 A.2d 234, 242 (Del.Super. 1999).....	9
<i>NRDC v. Texaco Refining and Marketing, Inc.</i> , 2 F.3d 493, 507 (3rd.Cir.1993) ...	21
<i>Tulou v. Raytheon Serv. Co.</i> , 659 A.2d 796, 802 (Del.Super. 1995).....	9
<i>U.S. v. Outboard Marine Corp.</i> , 549 F.Supp. 1036 (N.D.Ill.1982).....	21
<i>U.S. v. Stoeco Homes, Inc.</i> , 498 F.2d 597, 611 (3rd.Cir. 1974)	20

Statutes

7 <i>Del.C</i> §6001(5).....	10
7 <i>Del.C</i> §6001(6).....	10
7 <i>Del.C</i> §6001(c)(2)	11
7 <i>Del.C</i> . §6001(c)(6)	3, 11
7 <i>Del.C</i> . §6002(53).....	14
7 <i>Del.C</i> §6003(a)(4)	5, 14
7 <i>Del.C</i> §6003(b)(5).....	14
7 <i>Del.C</i> §6005(a).....	11, 13
7 <i>Del.C</i> . §6005(b)(2).....	11, 25
7 <i>Del.C</i> §6008	26
7 <i>Del.C</i> §6018	passim
7 <i>Del.C</i> §6025	3
7 <i>Del.C</i> §6025(a).....	14
7 <i>Del.C</i> §6025(b)(2).....	5, 14
7 <i>Del.C</i> §6025(c), (e)	14
29 <i>Del.C</i> . §8003(1).....	10
29 <i>Del.C</i> . §8003(2)(g).....	10
29 <i>Del.C</i> . §8003(7), (13).....	10
29 <i>Del.C</i> . §8014(5).....	10
7 <i>Del.C</i> . §6001	10
7 <i>Del.C</i> . §6020	11, 16

Rules

NEPA Law and Litigation §4:73 (2018).....26
Rule 9.020

Regulations

7 Del.Admin.Code §13018, 19
7 Del.Admin.Code §1301-4.1.1.110

NATURE OF THE PROCEEDINGS

This is an appeal by the State of Delaware Department of Natural Resources and Environmental Control (“DNREC”) from an Order¹ of the Superior Court dated March 15, 2019², affirming an August 8, 2017 decision of the Environmental Appeals Board (“EAB”), that denied enforcement of portions of a Secretary’s Order issued on August 2, 2016. The violations alleged are not disputed for purposes of review, and no factual issues are present on appeal. There was no evidentiary hearing below before the EAB. The sole issue presented is the extent of the DNREC Secretary’s authority under Title 7 of the Delaware Code to mandate compliance with the Regulations Governing Solid Waste, and to direct affirmative measures to account for and properly dispose of illegal waste and site remediation in the context of a cease and desist order issued pursuant to 7 *Del.C.* §6018.

¹ Trial Court Judgment and Rationale, *infra* on page 28.

² The Opinion of the Court, *infra* on page 29, was issued on February 21, 2019. A prior appeal in this matter, *DNREC v. McGinnis*, No. 93, 2019, was voluntarily dismissed, due to an issue over the finality (versus interlocutory status) of the original Court Order in this case. Those issues were resolved through the gracious consent of Appellee’s counsel to the entry of an order of final judgment in the Superior Court.

SUMMARY OF ARGUMENT

The Environmental Appeals Board committed an error of law and abused its discretion in failing to uphold an Order of the DNREC Secretary finding permit violations and requiring remedial action on the part of McGinnis Auto & Mobile Home Salvage, LLC (“McGinnis”), the Appellee. The Secretary had clear statutory authority to issue a cease and desist order, where McGinnis had dismantled older mobile homes containing asbestos, without first obtaining a resource recovery permit and employing proper safeguards for handling hazardous materials. Implicit in the broad statutory and regulatory authority of the Secretary to regulate solid waste is the power to order a violator to remove illegal waste from a contaminated site through proper remediation measures, and to document past handling of potentially hazardous construction and demolition debris. The General Assembly has delegated to the Secretary the authority to administratively mandate remedial actions, prior to (or in lieu of) seeking such relief through an injunction. The scope of the temporary administrative remedy is identical to the judicial remedy. Just as the Court of Chancery could exercise its authority to mandate compliance with the law through injunctive relief, the DNREC Secretary has broad authority to administratively order compliance and to monitor remediation within a period not to exceed thirty days.

STATEMENT OF FACTS

McGinnis Auto & Mobile Home Salvage, LLC (“McGinnis”) owns and operates a facility located at 4160 Downs Chapel Road, near Clayton, Kent County, Delaware. McGinnis’ business on the site includes the dismantling and salvage of abandoned and dilapidated mobile homes. It is uncontested that the McGinnis facility is subject to the State of Delaware statutory authority with respect to solid waste, 7 *Del.C.* §6001(c)(6) and §6025, and the Rules Governing Solid Waste, 7 *Del.Admin.Code* §1301.

On February 25, 2015, staff from the Solid and Hazardous Waste Management Section (“SHWMS”) of the State of Delaware Department of Natural Resources and Environmental Control (“DNREC”) conducted a site inspection, in order to determine McGinnis’ compliance with Delaware statutory and regulatory authority over resource recovery facilities. McGinnis was cited for improper storage of solid waste and for operating a materials recovery facility without a permit.³ A Notice of Violation issued on August 17, 2015⁴ required McGinnis to submit a detailed plan for the cleanup and removal of the waste, and further imposed a deadline of ninety days for the submission of a completed resource recovery permit application to DNREC.

3 . The site visit report dated March 24, 2015 is item 2(a) in the Record for Appeal at A-007.

4 . Record item 2(b) at A-012.

On September 17, 2015, McGinnis submitted a solid waste disposal plan⁵ that indicated the solid waste in question would be removed by July of 2016. However, McGinnis did not submit an application for a permit before the deadline of December 17, 2015.

DNREC SHWMS staff conducted a follow-up site visit on March 30, 2016. The same violations documented the previous year were observed. The original mobile home waste pile remained on site, with staff observing additional lumber, wallboard, plastics, insulation, and metal. There was no evidence of any removal of the waste in question.⁶ Martia McGinnis, the facility operator, claimed that some waste had been removed from the large pile; but she failed to provide any documentation or even an estimate of the volume of material removed. A letter⁷ was sent to McGinnis, notifying the facility operator of the potential for asbestos in the mobile home debris on site. McGinnis was given a deadline of July 17, 2016 to properly remove the waste pile.

Thereafter, McGinnis failed to comply with the statutory or regulatory mandates, and ignored the formal notifications from DNREC, and remained in violation. Secretary's Order No. 2016-WH-0032⁸ issued on August 2, 2016 cited

5. Record item 2(d) at A-014.

6. The report dated April 8, 2016 referencing the March 30, 2016 site visit is Record item 2(f) at A-019.

7. Record item 2(g) at A-023.

8. Record item 2(i) at A-025.

McGinnis for violating 7 *Del.C.* §6003(a)(4) and Rule 4.1.1.1, by collecting and processing solid waste, and operating a solid waste facility, without a permit.

McGinnis was further cited for disposing of solid waste in a facility lacking a permit, in violation of 7 *Del.C.* §6025(b)(2).

Based on the findings recited above, the facility was ordered to:

- (1) stop receiving and dismantling mobile homes and accumulating construction and demolition waste;
- (2) remove all waste consisting of discarded mobile homes and construction/demolition waste within thirty days;
- (3) comply with all applicable laws and regulations, specifically utilizing only those transportation companies, disposal facilities, and contractors holding valid permits;
- (4) provide, within thirty days, written documentation of the proper disposal or recycling of solid waste from the premises, including identification of the waste hauler used to transport the solid waste, and weigh tickets;
- (5) provide, within thirty days, as to each mobile home received since 2001, the date received, the vehicle identification number, date of manufacture;
- (6) provide, within thirty days, a detailed explanation of the handling, inspection, storage, disposal, and recycling procedures for all materials obtained from the mobile homes; and
- (7) submit, within thirty days, a completed application for a resource recovery permit, prior to accepting any additional mobile homes or construction/demolition waste.

In the Secretary's Order, DNREC reserved the right to take additional enforcement measures, including administrative actions for penalties for past and continuing violations, injunctive relief, and a civil action for penalties and costs, including attorney's fees.

The appeal to the Environmental Appeals Board (“EAB”) followed.⁹ The parties submitted simultaneous memoranda regarding the legal issues on May 19, 2017. In lieu of testimony or a hearing, the parties stipulated to the factual record for purposes of the legal issues, and engaged in oral argument on May 23, 2017. On August 8, 2017, the EAB issued a decision, upholding paragraphs (1) and (7) of the Secretary’s Order; but finding that the Secretary “did not have adequate legal authority to impose paragraphs (2) through (6) of the Order”. DNREC then filed an appeal to the Superior Court.

The EAB found that the Secretary lacked “adequate legal authority” to support paragraphs 2 through 6 of the Order. The Board explained this distinction by suggesting that a cease and desist order “is not the proper enforcement mechanism to mandate” what it described as “affirmative injunctive relief” [sic]. The seventh paragraph, upheld by the EAB, directed McGinnis to submit an application for a resource recovery facility permit within thirty days, if the company wished to resume receiving, dismantling, or recycling mobile homes or other construction or demolition debris, and emphasized that McGinnis could not accept such solid waste until a permit was granted. The seventh paragraph, much like paragraphs two through six, looks to compliance to be undertaken by McGinnis within the thirty-day duration of the Order.

9. Record item 2(j) at A-043.

The EAB did not cite a basis to distinguish between paragraph seven as enforceable and paragraphs two through six as unenforceable. Each of paragraphs two through seven mandates remedial steps that McGinnis must take within thirty days of the Order. In the odd nomenclature of the EAB Decision, this is characterized as “affirmative injunctive relief”, presumably recognizing that it would be within the power of a court to issue an injunction mandating such compliance. Thus, in addition to applying for a permit within thirty days (§7), McGinnis was ordered to remove all solid waste in compliance with applicable laws (§2), using transporters, contractors, and disposal facilities with valid permits (§3), and to provide documentation of such disposal (§4), all within the thirty-day duration of the cease and desist order. Further, McGinnis was directed to account for all mobile homes illegally received and dismantled on the site (§5), and to provide an accounting of its inspection, handling, storage, disposal, and recycling procedures for mobile homes (§6). In truth, paragraphs five and six look backward, not forward, to past records and procedures McGinnis should have maintained, and are not “affirmative” mandates to do something in the future. Paragraphs 2, 3, 4, and 7 each require action to be taken during the thirty-day statutory lifespan on the cease and desist order. The EAB “affirmative relief” distinction, such as it is, is thus totally lost.

The Superior Court acknowledged that the appeal presented an issue of first impression regarding the scope of the Secretary’s power.¹⁰ The Court readily acknowledged the Secretary’s “other significant general enforcement powers” found in Chapter 60 of Title 7.¹¹ However, the Court refused to consider this “concomitant authority” in the context of a cease and desist order.¹² Rather, the Court looked at the language of §6018 in isolation, declining to find the implied authority to include remedial actions or to mandate compliance with the law in a cease and desist order.¹³ The Court found DNREC’s argument, “that it is counterintuitive to recognize DNREC’s authority to revoke one violator’s permit[,] while prohibiting it from ordering corrective action against another violator who flouts his or her responsibility to operate without a permit”, to be “logical”, but an issue for legislative attention, rather than judicial interpretation.¹⁴

¹⁰ Opinion at 2.

¹¹ Opinion at 8.

¹² Opinion at 13.

¹³ Opinion at 12.

¹⁴ Opinion at 13.

I. DNREC PROPERLY EXERCISED THE CEASE AND DESIST POWER.

A. Question Presented.

The sole legal issue presented is the extent of the DNREC Secretary's authority under Title 7 of the Delaware Code to mandate compliance with the Regulations Governing Solid Waste, and to direct affirmative measures to account for and properly dispose of illegal waste and site remediation in the context of a cease and desist order issued pursuant to 7 *Del.C.* §6018.

B. Scope of Review.

On appeal from a decision originating in the EAB, the reviewing court's role is to determine whether the Board's decision is supported by substantial evidence, and is free from legal error.¹⁵ The decision of the Board may be reversed for an abuse of discretion or an error of law.¹⁶ In this case McGinnis, has not disputed the factual allegations for purposes of appeal, and thus there is no evidentiary issue. The violations can be assumed, for purposes of assessing the Secretary's authority. The only issue on appeal is whether the Secretary's acknowledged legal authority to deal with the violations can be applied in the context of a cease and desist order.

¹⁵ *Tulou v. Raytheon Serv. Co.*, 659 A.2d 796, 802 (Del.Super. 1995) (EAB erred as a matter of law in finding that the Secretary's decision was not supported by evidence).

¹⁶ *Motiva Enterprises LLC v. DNREC*, 745 A.2d 234, 242 (Del.Super. 1999) (reversing EAB finding that DNREC treated the violator in an arbitrary and capricious manner).

B. Argument.

The General Assembly afforded the DNREC Secretary broad authority to supervise, direct, and account for the operation of the agency and its subdivisions, including Waste and Hazardous Substances. *29 Del.C.* §8003(1). Included are the power to promulgate rules for the administration and operations of the agency, and to supervise and direct law enforcement officers responsible for the enforcement of the laws, regulations, rules, permits, licenses, orders and program requirements of the agency. *29 Del.C.* §8003(7), (13). The Secretary is authorized to appoint a Director of Waste and Hazardous Substances. *29 Del.C.* §8003(2)(g). The Division of Waste and Hazardous Substances has primary authority for matters concerning solid and hazardous waste. *29 Del.C.* §8014(5).

In administering the agency, the Secretary is guided by specific legislative findings, broad policy statements, and the articulated purpose for DNREC. *7 Del.C.* §6001. With respect to the development, utilization, and control of natural resources, the General Assembly found that the environment must be protected from pollution, in the interest of the health and safety of the public. §6001(5). Natural resources can best be utilized, conserved, and protected if utilization thereof is restricted to beneficial uses and controlled by a state agency responsible for proper development and utilization of the land, water, underwater and air resources of the State. §6001(6).

The stated purpose of Chapter 60 of Title 7 of the Delaware Code is to effectuate State policy by providing for the management of natural resources to protect the public health, safety, and welfare. §6001(c)(2). In particular, the legislature singled out the need for a program “for improved solid waste storage, collection, transportation, processing and disposal by providing that such activities may henceforth be conducted only in an environmentally acceptable manner pursuant to a permit obtained from the Department”. §6001(c)(6). The DNREC Secretary is charged with enforcement of Chapter 60 of Title 7. §6005(a). This chapter, being necessary for the welfare of the State and its inhabitants, is to be liberally construed by the courts in order to preserve the land, air and water resources of the State. *7 Del.C.* §6020.

The Court below discussed these and other powers of the Secretary¹⁷, including the authority to assess administrative penalties¹⁸, to file civil penalty actions in the Superior Court¹⁹, and to seek injunctive relief in the Court of Chancery²⁰. Yet, paradoxically, the Court found that the Secretary was deprived of the ability to exercise these and other powers broadly granted by the General Assembly, in conjunction with a cease and desist order.²¹

¹⁷ Opinion at 8.

¹⁸ *7 Del.C.* §6005(b)(1).

¹⁹ *7 Del.C.* §6005(b)(3).

²⁰ *7 Del.C.* §6005(b)(2).

²¹ Opinion at 12-13.

This restrictive interpretation disregarded the holding of this Court in *Formosa Plastics Corp. v. Wilson*, 504 A.2d 1083 (Del. 1986), wherein the “concomitant authority” of the Secretary to revoke a permit was implied from the same statutory provisions providing remedies for permit violations. If the extreme sanction of revocation can be implied as a concomitant power, the far lesser directives here to account for and remediate illegal waste products can surely be seen as well within the Secretary’s concomitant authority. As the Court below conceded, “it is counterintuitive to recognize DNREC’s authority to revoke one violator’s permit[,] while prohibiting it from ordering corrective action against another violator who flouts his or her responsibility to operate with a permit.”²² The argument is not merely logical or intuitive, but practical and straightforward statutory interpretation.

This appeal is controlled by the Court’s analysis of the Secretary’s authority in *Formosa*. No other precedent exists. The Superior Court acknowledged this Court’s recognition in *Formosa* of “a broad implied authority” for permit revocation based on “concomitant authority” found in Chapter 60 of Title 7.²³ Yet that Court inexplicably failed to find the broad “concomitant power” of enforcement to be “relevant to cease and desist orders”.²⁴ This is clear error.

²² Opinion at 13.

²³ Opinion at 12-13.

²⁴ Opinion at 13.

In *Formosa*, the Secretary revoked an air permit because the company could not or would not comply with the conditions of its permit and other environmental laws, and could not reasonably be expected to comply in the future, posing a threat to the safety and welfare of citizens.²⁵ As here, the record reflected a consistent pattern of environmental violations, and an “almost complete disregard” of applicable regulations.²⁶ Despite the availability of a pre-revocation hearing, the company sought an injunction to bar enforcement of the law. The Court of Chancery denied an application for a preliminary injunction to prevent revocation. As in this case, the challenge on appeal was to the authority of the Secretary.

This Court acknowledged the lack of express statutory authority to revoke a permit, but relied on the “substantial enforcement responsibilities” of the Secretary, and the lack of any statutory modification or limitation on those duties.²⁷

As the Court concluded:

The terms of this statute are broad and plenary. We construe them as the imposition of an emphatic duty and a conferral of all necessary concomitant powers to give full force and effect to the clear legislative mandate of the Act.²⁸

Moreover, the Secretary’s regulatory powers as to emissions were recognized as being specific, as they are for solid and hazardous waste.

²⁵ *Id.* at 1087.

²⁶ *Id.* at 1086.

²⁷ *Id.* at 1088; citing 7 *Del.C.* §6005(a).

²⁸ *Id.*

“Solid waste” is defined at 7 *Del.C.* §6002(53) to include “any garbage, refuse, refuse-derived fuel, demolition and construction waste wood, ... and other discarded material...” The DNREC Secretary is given exclusive statutory authority to effectuate the provisions of Chapter 60 with regard to solid waste. §6025(a). No person may cause or contribute to the disposal of solid waste anywhere in the State, except in facilities that have received a permit from DNREC. §6025(b)(2). A violation of this provision may subject the violator to criminal prosecution and/or civil liability. §6025(c), (e). A permit is required in order to “undertake any activity to cause or contribute to the collection, transportation, storage, processing or disposal of solid wastes, regardless of the geographic origin or source of such solid wastes”. §6003(a)(4). No person shall, without first having obtained a permit from the Secretary, construct, install, replace, modify, or use any equipment or device or other article for disposal of solid waste. §6003(b)(5).

According to Rule 3.0 of the Delaware Rules Governing Solid Waste, 7 *Del.Adm.Code.* §1301, “resource recovery” means “the process by which materials.... which still have useful physical or chemical properties after serving a specific purpose, are reused or recycled for the same or another purpose, including use as an energy source.” The term “resource recovery facility” includes a

“materials recovery facility”, which is “a facility at which materials, other than source separated materials, are recovered from solid waste for recycling or for use as an energy source”. *Id.* Such facilities are governed by Rule 9.0.

In this case, it is undisputed (for purposes of appeal) that McGinnis was operating a resource recovery facility without a permit. Further, as established by DNREC site inspections, McGinnis had been, for years, receiving abandoned and dilapidated mobile homes, for the purpose of breaking down the structures to obtain materials that could be sold. The debris on site included a huge pile of discarded lumber, wallboard, plastics, insulation, and metal. McGinnis admittedly took no steps to identify or properly dispose of hazardous materials such as asbestos. The goal of the Secretary in issuing the enforcement order was not only to halt the receipt and dismantling of mobile homes, but also to enforce compliance with regulations mandating the removal and proper disposal of construction and demolition materials, and to provide DNREC with documentation of the source of mobile homes and destination for waste material.

Just as the power to revoke permits for violations was implied from the Secretary’s permitting authority in *Formosa*, the power to ensure compliance and remediation is consistent with the broad and substantial enforcement authority

residing in 7 *Del.C.* §6018.²⁹ Revocation is a more drastic sanction than the conditions imposed here by the Secretary. In *Formosa* a large facility would be forced to shut down, whereas in this case McGinnis could continue to operate the junkyard, if the company complied with the law. If the drastic action of closure was within the scope of the Secretary's authority, it stands to reason that the more measured Order here was justified.

The Court concluded in *Formosa* that “the authority to place such reasonable conditions upon the issuance of permits also confers a rectifying power to revoke them when the conditions are violated”³⁰. A similar principle applies here, where the power to halt an ongoing violation also confers a “rectifying power” to enforce compliance with the Regulations and remediation, measures well short of revocation. As the Court observed in *Formosa*, not only is this consistent with common sense, but it gives effect to the mandate of the Delaware General Assembly that Chapter 60 of Title 7 be generously construed to achieve its purpose, to protect the environment. The Superior Court's narrow construction of the cease and desist statute to defeat enforcement violated the mandate of 7 *Del.C.* §6020 for liberal statutory construction.

²⁹ The cease and desist statute was cited with approval by the Court in the *Formosa* opinion, at 1089.

³⁰ *Id.* at 1089.

The cease and desist order here was a modest effort to enforce the Regulations governing “resource recovery” operations in order to safeguard the local ecosystem. The Secretary recognizes that, as this Court stated in *Formosa*³¹, the “broad and pervasive powers” that “repose in the Secretary”, must be exercised with “procedural safeguards and fairness”. The history of this case embodies those safeguards. An Order that was issued going on three years ago has not been implemented, due entirely to McGinnis taking full advantage of the available procedural safeguards, including bankruptcy protection, this appeal, the prior appeal to the Superior Court, and the original appeal to the EAB. At every stage, McGinnis has been afforded due process of law, and has sustained no harm from the efforts of DNREC to enforce the solid waste laws and permit conditions in the face of serious violations creating a risk to public health and natural resources.

In *Formosa, supra* at 1088, this Court emphasized the “substantial enforcement responsibilities” of the DNREC Secretary, as well as the “broad and plenary” terms of Chapter 60. “We construe them as the imposition of an emphatic duty and a conferral of all necessary concomitant powers to give full force and effect to the clear legislative mandate of the Act.” *Id.* The Court found that the Secretary’s authority to revoke permits included the unquestioned power to impose reasonable conditions on their issuance. *Id.* at 1089, *citing* 7 *Del.C.* §6018.

³¹ At 1089.

Just so, the authority to order here that the illegal resource recovery operation cease included the power to enforce compliance with applicable Regulations, and to compel remediation of the site through proper removal of the accumulated solid waste.

The cease and desist power is a procedural administrative enforcement tool of broad scope but limited lifespan. The Secretary may issue a cease and desist order to a violator, pursuant to 7 *Del.C.* §6018:

The Secretary shall have the power to issue an order to any person violating any rule, regulation or order or permit condition or provision of this chapter to cease and desist from such violation; provided, that any cease and desist order issued pursuant to this section shall expire (1) after 30 days of its issuance, or (2) upon withdrawal of said order by the Secretary, or (3) when the order is suspended by an injunction, whichever occurs first.

Note that the legislature did not place any limits on the scope of a cease and desist order; only on its duration. While the Secretary has broad enforcement power, the statute only allows a maximum of thirty days in which to achieve compliance. The transitory nature of the cease and desist power suggests that the General Assembly intended that such orders be utilized sequentially as an administrative prelude to injunctive relief. If DNREC fails to achieve compliance with the terms of the order within thirty days, it expires, and the agency is left to pursue other remedies. The General Assembly created this temporary procedural tool as a way of effectively and quickly obtaining results in cases of some urgency.

The statute specifically anticipates that a cease and desist order may be superseded by an injunction. The General Assembly thus expected the Secretary to exercise administrative powers equivalent to those of a court issuing an injunction. Obtaining compliance administratively would avoid the use of judicial resources. The distinction is not in the scope of the remedy, but in its duration, and in the authority to enforce it. Whether exercised administratively or judicially, this power includes remediation, future compliance, and the prevention of future violations. Nothing in the statutory language prevents a cease and desist order from containing affirmative, as well as prohibitory, mandates.

The Order in this case mandated compliance with such “reasonable conditions” within its thirty-day life pursuant to §6018. That Order was fully enforceable, as a matter of law. The Superior Court erred as a matter of law in suggesting that the holding in *Formosa* cannot be applied to enforcement through a cease and desist order. It is inconsistent and illogical to suggest that the ultimate sanction of revocation may be utilized in enforcement of permit violations, but that lesser intermediate remedial action cannot be required, where the facility failed to obtain a proper permit, and illegally stockpiled waste. This “counterintuitive” result cannot be reconciled with *Formosa*, with the Solid Waste Regulations, or with the mandate for liberal judicial construction of statutes intended to protect natural resources from degradation.

As an interim administrative measure, the cease and desist authority works only if concurrent in scope with a preliminary injunction. In seeking an injunction to prevent further environmental harm, the scope of injunctive relief must be patterned to the degree of harm.³² The Court has broad authority to order prospective remedies to correct violations.³³ Positive injunctive relief to abate continuing violations and to prevent future violations is contemplated by environmental laws granting broad power to restrain violators and mandate compliance.³⁴ The jurisdiction to restrain violations includes the authority to require future compliance. *Id.* An injunction should be tailored to direct compliance with permit parameters that are being continuously or intermittently violated.³⁵ Courts have broad authority to issue preliminary injunctions broad enough in scope to prevent further or future environmental harm.³⁶

³² *U.S. v. Stoeco Homes, Inc.*, 498 F.2d 597, 611 (3rd.Cir. 1974) (remanding for entry of injunction to prevent continued deposit of dredge spoil).

³³ *James Julian, Inc. v. State of Delaware*, 1991 WL 2245757 (Del.Ch. Oct. 29, 1991) (granting injunction mandating rebidding of highway project due to prevailing wage law violations).

³⁴ *U.S. v. Outboard Marine Corp.*, 549 F.Supp. 1036 (N.D.Ill.1982) (issuing injunction to company discharging brake fluid containing PCB's requiring removal and treatment of contaminated soil).

³⁵ *NRDC v. Texaco Refining and Marketing, Inc.*, 2 F.3d 493, 507 (3rd.Cir.1993) (suit under Clean Water Act alleging permit violations by Delaware City Refinery).

³⁶ NEPA Law and Litigation §4:73 (2018). *See also* 36 Harv. Law Rev. 483 (1928) (mandatory injunction to compel repair of drainage works on plaintiff's land).

In providing that a cease and desist order could be “suspended by injunction”, the General Assembly confirmed that the power vested in the Secretary to avoid environmental harm, past, present, and future, matched that of the courts. Rather than potentially burden the courts with emergency applications for injunctive relief, the legislature provided an alternative administrative path to enforce compliance with environmental laws. If, as the Court below held, that power is truncated to exclude affirmative relief, the enforcement process would fail, and a vestigial cease and desist power would be of little utility. The statute provides no basis for the Court to distinguish between termination of activity at the site, on the one hand, and removal, disposal, and documentation of waste illegally accumulated on site, on the other.

The administrative remedy would be ineffectual, if shorn of its remedial and preventative powers, and limited to a mere cessation of activity. The enforcement mechanism contemplated by the General Assembly necessarily includes the power to order the violator to abstain from future violations, by complying with all applicable regulatory provisions. It thus incorporates, and does not exclude, the other broad enforcement authority of the Secretary referenced above. This is not an “expansion” of §6018, but a recognition that the cease and desist power is a procedural mechanism for enforcing other substantive provisions of Title 7.

The statutory thirty-day duration of a cease and desist order confirms that the Secretary “retains jurisdiction” after issuance to enforce compliance. It is not a “one and done” enforcement tool. If such an order merely contemplated cessation and nothing more (as the EAB and the Court below have mistakenly concluded), there would be no basis for extending enforcement over a period of up to thirty days. An order lacking the power to enforce compliance would place the environment and public health at risk. Such an emasculated interpretation would force DNREC to resort to litigation, rather than to pursue the preliminary administrative remedy that the legislature provided.

It was an abuse of discretion for the EAB to substitute its collective “opinion that there may exist other, more appropriate, enforcement mechanisms available to the Secretary....”³⁷ It is for the Secretary, through the exercise of the broad discretion in the exercise of enforcement authority conferred by the General Assembly, to determine the appropriate enforcement mechanism to employ in response to a violation. It is not the Board’s place to question that exercise of discretion. The Secretary properly chose an approach designed to bring McGinnis into compliance within thirty days, without resort to litigation, reserving the right to seek penalties at a future time.³⁸

³⁷ Board Opinion at 5.

³⁸ It is worth observing that the Cease and Desist Order here was a minimal sanction against McGinnis, as compared to administrative and civil penalties and

The EAB ruling amounted to administrative board members second-guessing the Secretary on his exercise of discretion in using the arsenal of procedural tools afforded by the General Assembly to protect the environment. This ruling was more precisely a usurpation rather than an abuse of authority. It was based on the false premise that the Secretary, in issuing an order pursuant to §6018, is barred from using his other enforcement powers to achieve compliance with State law. In other words, the Board chose to look solely at the form of the Order, ignoring the substance of the Secretary's statutory powers. The Court below readily acknowledged those broad powers, but essentially found that they disappear when a cease and desist order is issued. Such a narrow view creates an artificial distinction between the power to order a violator to stop disobeying the law, and the related (and undisputed) power to mandate compliance with applicable law, including remediation and documentation. An order incorporating both the former and latter is precisely the approach that the legislature anticipated, in enacting §6018 and explicitly making it a prelude to injunctive relief.

Were the use of cease and desist orders to be curtailed in the way advocated by the EAB and sustained by the Court below, §6018 would cease to be an effective means to combat violations, and DNREC would be forced to pursue

cost recovery, a preliminary injunction, or criminal charges. This particularly true, given the history of site inspections, warnings, and the notice of violations.

litigation to force compliance, a path not contemplated by the statute in the first instance. Eliminating this tool would mean that violators – including particularly small businesses with limited resources - would be deprived of a relatively simple, informal, and inexpensive way to deal with alleged violations.

As foreseen by the legislature, the issuance of a cease and desist order may be sufficient to bring a violator into compliance without penalty or litigation. Where, in response to a cease and desist order, a violation has been resolved, and is not contested, the parties may reflect the terms of that resolution through conciliation³⁹. As the name implies, the Secretary may document the agreement by setting forth the violation and a reasonable time for its correction, with a final order of conciliation to be issued, unless a hearing is requested.

The General Assembly did not intend that the Secretary be free to force a violator like McGinnis to stop accepting construction and demolition debris, while unable to order compliance within the thirty-day duration of the cease and desist order. Such an artificial distinction leaves the accumulated debris on site, without testing or proper removal, without documentation, and without an application for a resource recovery permit. In the face of stipulated facts and clear statutory authority, there is no legal basis to deny DNREC this remedy.

³⁹ 7 *Del.C.* §6005(b)(2).

The Cease and Desist Order issued to McGinnis was a series of seven steps to deal with admitted violations in expedited fashion, administratively, short of litigation. These seven steps are closely integrated, and there is no basis for severance. There is no statutory basis to distinguish between these aspects of the Order, all of which are related to the violations cited and the urgent need to obtain compliance with the law. McGinnis was neither surprised nor prejudiced by the Secretary's Order. The company had been warned over a year earlier about unlawful solid waste on the site. The Notice of Violation issued in August of 2015 gave McGinnis a clear path forward, and warned of the consequences of continuing to accumulate construction and demolition debris without a permit for resource recovery. The cease and desist order was the least intrusive enforcement mechanism that DNREC could have used. Rather than seek penalties either administratively or in a civil action, or an injunction, DNREC sought to end the illegal activity and to mandate future compliance with the law.

McGinnis was not denied the right to review of the Secretary's Order. Any person whose interest is substantially affected by *any action of the Secretary* may appeal to the Environmental Appeals Board within 20 days after receipt of the Secretary's decision or publication of the decision. [emphasis added] §6008. McGinnis was entitled to review of any enforcement action, regardless of the form of order.

DNREC relies on the holding and the sound reasoning of the Court in *Formosa* as controlling and persuasive authority to reverse the EAB decision to the contrary. As all agreed below, it is the only applicable precedent. There is no Delaware authority mandating a constricted reading of the cease and desist power or the proposition that the Secretary cannot use it as a means to an end of mandating compliance with the law and remediation of the environment. No case supports such a limitation on the Secretary's statutory authority. Such a result would virtually eliminate a key component in the enforcement arsenal that has been used countless times to prevent further environmental harm. It would ignore both the broad legislative grant of power to the Secretary to protect the environment and public health in the face of urgent threats, and the judicial approval and reinforcement of that authority.

CONCLUSION

This case comes down to the simple question of whether a cabinet secretary can use a procedural tool granted by the legislature to compel compliance with laws he is authorized to enforce. Does the citation of one statutory tool somehow prevent the exercise of other statutory authority to enforce the law? Under the guidance of *Formosa*, the answer to the first question must be yes, and the answer to the second question must be no. There is no statutory basis to unduly constrict the Secretary's use of enforcement power that is already limited in duration and subject to appeal. The General Assembly has given the DNREC Secretary a broad mandate, and a procedural toolbox from which to enforce substantive laws. As in *Formosa*, the power to cite violations implies the power to impose remedies.

The power to terminate a violation includes the power to eliminate the risk presented. A cease and desist order deals not simply with past or contemporaneous harm, but necessary steps mandated by law to halt future harm and to remediate the site. The Order at issue was a legitimate effort to holistically deal with serious solid waste violations by controlling the adverse consequences of contamination. The Order mandated compliance with applicable regulations and statutes. Compliance was mandated within the thirty-day statutory duration of a cease and desist order. There is no legal justification to undermine the Secretary's statutory authority. The Board's ruling should be reversed, and the Order reinstated.