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IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEEP OUR WELLS CLEAN, GAIL SALOMON, EUGENIA GRACE NAVITSKI, VLAD ERIC NAVITSKI, THOMAS DIORIO, LYNN TAYLOR-MILLER, CHARLIE MILLER, and VIRGINIA WEEKS Appellants, v. DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL, and ARTESIAN WASTEWATER MANAGEMENT, INC., Appellees.	No. 138,2020 Court Below: Superior Court of the State of Delaware C. A. No. S19A-07-002 ESB

APPELLEE ARTESIAN WASTEWATER MANAGEMENT, INC.'S ANSWERING BRIEF

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NATURE OF THE PROCEEDINGS

Having now failed to convince two reviewing appellate bodies of their unreasonable reading of the controlling environmental regulations, Appellants file another appeal seeking to obstruct or delay a properly permitted and beneficial wastewater treatment solution in southern Delaware.

The Department of Natural Resources and Environmental Control ("DNREC") granted Artesian Wastewater Management, Inc. ("Artesian") a construction permit to build a wastewater treatment and disposal system in southern Delaware in 2013. The site location was selected to meet the various wastewater treatment and disposal demands of the surrounding region, with a first phase that would handle wastewater from a residential development. The need for residential wastewater treatment had not yet materialized, but another need arose.

In 2017, Artesian applied to amend its construction permit to dispose of treated wastewater from a food processing plant operated by Allen Harim Foods LLC ("Allen Harim"). To accommodate this regional wastewater need, Artesian proposed minor changes to the site design, keeping the central feature of spray irrigation to dispose of the effluent, and re-phased construction of portions of the originally approved design. Disposal of wastewater from Allen Harim at ANSRWRF will provide an important environmental improvement to the region because, at present, the effluent is stream discharged into the Broadkill River

watershed. ANSRWRF will repurpose the effluent for spray irrigation on farmland.

DNREC amended its regulations governing on-site wastewater treatment and disposal in 2014 – after Artesian received its construction permit and before Artesian filed its application to amend the construction permit. The Secretary reviewed and approved the application to amend the permit, finding it complied with the 2014 regulations.

The Appellants ("KOWC"), a group of citizens living near the site, made no objection when the site was selected and permitted in 2013 and presented virtually no testimony or evidence during the public hearings for the permit amendment. KOWC, however, appealed DNREC's decision to amend the construction permit to the Environmental Appeals Board ("EAB"), presenting expert testimony and interpretations of EAB regulations that were not raised during the public hearing stage. The EAB affirmed the Secretary's decision. KOWC appealed to the Superior Court which also affirmed the Secretary's decision.

KOWC asserts essentially three points in its appeal to this Court: (1) the EAB mistakenly held that the 2014 regulations did not apply to Artesian's permit amendment or, in the alternative, did not provide a detailed analysis of how the 2014 regulations apply; (2) under the 2014 regulations, it was an error of law for the Secretary and the EAB to allow amendment of Artesian's construction

permit without requiring submission of a Hydrogeologic Suitability Report ("HSR") and a Surface Water Assessment Report ("SWAR") with its application – studies which were not required when DNREC originally issued Artesian a construction permit; and (3) the case should be remanded for additional evidence because the EAB improperly prevented KOWC's expert from concluding his testimony.

KOWC's first appeal point is based on a flawed premise. The EAB did *not* hold that the 2014 Regulations are inapplicable to Artesian's permit amendment. The EAB affirmed the Secretary's Order because it found that the controlling provision of the 2014 regulations, Section 6.3.1.14.1, did not require a submission of an HSR or SWAR.

KOWC's second appeal point also fails. The EAB based its finding on the only reasonable reading of the 2014 regulations: (1) under Section 6.3.1.14.1, amendments to unexpired construction permits are allowed if the changes are not significant; and (2) an HSR and SWAR are only required for new permit applications under Section 6.5. By contrast, KOWC's interpretation is unreasonable. Under its view, construction permit amendments are ***never*** allowed, requiring permittees to completely re-do the site selection process and submit a new construction permit application – no matter how small the change to the original permit.

Alternatively, if the Court determines that the regulations are ambiguous, DNREC's reading is afforded deference. Under well-settled law, an agency's construction of its own regulations controls, unless clearly wrong. DNREC drafted the 2014 regulations and its interpretation of them should be upheld.

The third appeal point calling for additional evidence is belied by the substantial evidence in the record that Artesian submitted all the materials required under Section 6.3.1.14.1 for an amendment to a construction permit and that the proposed changes were minor. Additionally, KOWC did not appeal the EAB's decision excluding its expert's testimony to the Superior Court. Finally, the EAB's regulations give it discretion to exclude "irrelevant" and "immaterial" evidence.

The EAB's decision should be affirmed.

SUMMARY OF THE ARGUMENT

1. Denied. The EAB's decision was based on the application of the 2014 Regulations to the 2017 Permit Amendment. The EAB found that Artesian made the necessary submissions for permit amendments under Section 6.3.1.14.1 and that the proposed design changes to ANSRWRF were not significant enough to require a new construction permit.

2. Denied. The EAB *did* address what the 2014 Regulations require for the 2017 Permit Amendment: "plan, specifications and design engineers report contemplated by subsection 6.3.1.14.1" and that the "changes are not significant enough to require…a new permit application."[1] The EAB found that Artesian complied with these requirements. Under the relevant case law, there is a sufficient record for this Court to review and affirm the EAB's decision. KOWC provides no authority to the contrary.

3. Denied. KOWC's interpretation of the 2014 Regulations, which recognizes no possibility of amending an existing construction permit, creates an unreasonable and unfair permitting process where changes to system design – no matter how minor – would result in a complete do-over of site selection and evaluation. This interpretation is also contrary to the plain language of Section 6.3.1.14.1, which applies where "changes have occurred" – necessarily

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[1] EAB Decision at 12 (A.579).

referring to amending an existing permit. Construction permit amendments are allowed, so long as the changes are not significant and the permittee makes the specified submissions – none of which are an HSR or SWAR.

4. Denied. The only reasonable reading of Section 6.5 and its requirement of an HSR and SWAR is that it applies to new permits. Section 6.5 speaks in terms of the requirements needed to "obtain" a permit. This can only mean that there is no existing permit. Section 6.5 and the preparation and submission of an HSR or SWAR do not apply to permit amendments.

5. Denied. If there is any ambiguity in the 2014 Regulations as to whether Section 6.3.1.14.1 allows permit amendments or whether Section 6.5 requires the submission of an HSR or SWAR for permit amendments, DNREC's reading controls. Where an agency drafts regulations, its interpretation is given deference, unless "unreasonable" or "clearly wrong." To the extent that KOWC has shown another possible, or even reasonable reading of Sections 6.3.1.14.1 and 6.5, DNREC's reasonable interpretation governs – allowing permit amendments without a blanket requirement of submitting an HSR and SWAR.

6. Denied. There is substantial evidence in the record to support the Secretary's and the EAB's finding that the changes to ANSRWRF's design were not substantial enough to require a new construction permit and that Artesian submitted all required materials. KOWC's claim that the case should be remanded

for additional presentation of evidence fails for multiple reasons. This argument was waived because it was not raised as an appeal point before the Superior Court. Even if it is not waived, the EAB has the discretion to exclude immaterial and irrelevant evidence. The EAB excluded testimony concerning the difference between the HSR and studies under the 1999 Regulations. That testimony was excluded because it was not germane to the issue before the EAB: whether an HSR and SWAR were required for Artesian's application to amend its permit.

STATEMENT OF FACTS

1. The 2013 Construction Permit And The 2017 Construction Permit Amendment.

On October 15, 2013 DNREC issued a construction permit (the "2013 Permit") to Artesian approving the site selection and design for the Artesian Northern Sussex Regional Wastewater Recharge Facility ("ANSRWRF"). *See* 2013 Permit at 1 (A.588).

The site for ANSRWRF was selected and approved to "serve as a regional facility meeting existing and future wastewater needs within the Artesian Wastewater service territories in Sussex County, Delaware." (A.606, A.443-44, A007). The initial Phase I design allowed ANSRWRF to treat wastewater from a residential development project. *See* 2013 Permit at 3 (A.590). The design utilized spray irrigation of effluent on farmland. *Id.* Phase I of the construction included storage ponds, spray fields and a wastewater treatment facility. *See* EAB Decision at 4 (A.571). DNREC reviewed the 2013 Permit under DNREC regulations promulgated in 1999 ("1999 Regulations"). *See* 3/12/19 Tr. at 50:9-13 (A.398). KOWC made no objection to the 2013 Permit, thereby waiving the ability to challenge the site location.

KOWC seeks to present an inaccurately narrow description of the approvals that DNREC issued in 2013 concerning selection of the site. KOWC states that Phase I was limited to domestic wastewater, on-site treatment and a

volume of 1 million gallons per day ("MGD"). O.B. at 6. DNREC, however, actually approved the site for development of a regional wastewater treatment facility in three phases. The site was also approved for industrial wastewater such as the effluent from Allen Harim and for 6 to 7 MGD.[2] *See* 3/12/19 Tr. at 32:21-24 (A.380), 95-96 (A.443-444). Contrary to KOWC's myopic focus on Phase I, the changes in design that Artesian requested in its application to amend its construction permit easily fell within the site approvals granted as part of the 2013 Permit.

Based on DNREC's issuance of the 2013 Permit, Artesian began construction and development of the ANSWRF site. This included building a paved entrance, stormwater ponds and other installations.[3] In compliance with the 2013 Permit, Artesian also sunk groundwater monitoring wells.[4]

On May 9, 2017, Artesian filed an application to amend the 2013 Permit. *See* 5/9/17 App. (A.001-002). The amendment did not change the location of the site or the long term plan for the site to handle future wastewater needs in

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[2] The construction permit application for a revised Phase I deferred on-site treatment because Allen Harim will treat its wastewater. Sec. 2017 Order at 5 (A.072).

[3] *See* 8/11/17 R. Wyatt Ltr. to J. Hayes at 2 (as of January 1, 2013, "[a] paved entrance, stormwater ponds and other installations have been constructed at [ANSRWRF]…") (B003); 5/22/18 Hr'g Tr. at 68:11-18 (A.199).

[4] 5/22/18 Hr'g Tr. at 68:19-24 (A.199).

the region. The purpose of the amendment was to change the source of the wastewater effluent for Phase I from residential to an Allen Harim food processing plant – a type of source already approved for the site. *See* 5/5/17 Am. DDR at § 3.1 (A.007); 3/12/19 Tr. at 95-96 (R.443-444). The effluent would still be used for spray irrigation on farmland. *Id.* By Order No. 2017-W-0029, dated November 2, 2017, the Secretary of DNREC granted the permit amendment (the "2017 Permit Amendment"), pursuant to Section 6.3.1.14.1 of DNREC's *Regulations Governing the Design, Installation and Operation of On-Site Wastewater Treatment and Disposal Systems*, promulgated in 2014 (the "2014 Regulations"). *See* Sec. 2017 Order at 4 (A.071).

The Secretary identified three primary changes contained in Artesian's permit amendment application. *See* Sec. 2017 Order at 5 (A.072). First, the Phase I storage pond would be increased in size from a capacity of 62 million gallons to 90 million gallons. *Id.* The storage pond would remain on the same original 75 acre tract. *Id.* Second, the construction of the on-site wastewater treatment plant would be delayed until Phase II. *Id.* During Phase I, the wastewater would be treated at the Allen Harim plant. *Id.* The Secretary found that this change would reduce the land disturbance on-site. *Id.* Third, the spray irrigation areas, although remaining on the originally approved 1,700 acres, would be reduced. *Id.* at 5-6 (A.072-A.073); 11 (A.078). The Secretary found all three

changes to be reasonable and in compliance with environmental laws and regulations. *Id.* at 5-6. (A.072-073).

2. The Appeal To The Environmental Appeals Board.

On November 28, 2017, Keep Our Wells Clean, Gail Salomon, Yauheniya Zialenskaya, Uladzislau I. Navitski, Thomas DiOrio, Lynn Taylor-Miller, Charlie Miller and Virginia Weeks (collectively "KOWC") appealed the Secretary's order approving the 2017 Permit Amendment by filing a Statement of Appeal with the EAB. *See* A.125. The grounds for KOWC's appeal included that the Secretary should not have granted the 2017 Permit Amendment because Artesian did not submit an HSR or a SWAR, under Sections 6.2.3 and 6.2.4 of the 2014 Regulations. *See* A.127-128.[5]

The EAB held a hearing on KOWC's appeal on May 22, 2018. Prior to the hearing, DNREC and Artesian filed motions to dismiss The EAB heard argument and denied both motions. *See* 5/22/18 Tr. at 112:3-4 (A.243).

DNREC and Artesian also filed motions in limine. DNREC argued that the evidence at the hearing should be limited to issues regarding amendment of the construction permit and should not address operational issues that will be addressed in an operating permit that DNREC will issue after construction is

[5] KOWC's appeal to the EAB included several other allegations of purported error that were procedurally improper or plainly lacked merit. KOWC has abandoned those arguments on appeal to this Court. (*See* A.127-130).

complete. *See* 5/22/18 Tr. at 113 (A.244). Artesian argued that KOWC should not be permitted to present expert witnesses at the hearing, because those witnesses' opinions and conclusions were not part of the public record before the Secretary when the Secretary issued his Order.[6] *See id.* at 124 (A.255). The EAB granted DNREC's motion in limine, holding that the "evidence presented [before the EAB] must be limited to evidence before the Secretary that speaks to proper site selection and system design and not to the operations of the plant." *See id.* at 167 (A.298). The EAB denied Artesian's motion in light of the restriction placed on evidence by the Board's ruling on DNREC's motion. *See* EAB Decision at 8 (A.575).

After the EAB's decisions on the motions, the parties alerted the EAB that they wished to adjourn the hearing to provide time to discuss settlement. *See* 5/22/18 Tr. at 168-171 (A.299-302). The EAB granted the adjournment. *See id.* at 172-173 (A.303-304). The settlement efforts proved unsuccessful.

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[6] The members of KOWC submitted few comments during the public comment period for Artesian's permit amendment application. The record reflects that only two KOWC members, Andrea Green and Anthony Scarpa, provided public comments during the July 27, 2017 public hearing. *See* H.E. Report at 7-8 (A.086-87). These comments consisted mostly of questions and unsupported concerns regarding unrelated violations by Allen Harim and alleged expirations of leases and zoning approvals. None of KOWC's public comments constituted or even resembled expert reports or materials of the type KOWC attempted to present at the EAB hearing *See id.*

The hearing was continued on March 12, 2019. The EAB heard testimony from DNREC witness Jack Hayes, the Program Manager for the Large Systems Branch of the Groundwater Discharges section. Mr. Hayes was involved in the promulgation of the 2014 Regulations. *See id.* 3/12/19 Tr. at 38:23-24; 39:1 (A.386-387). He was also involved in the review and approval of both the 2013 Permit and the 2017 Permit Amendment. *See id.* at 30:15-17 (A.378); *id.* at 28:22-24; 29:1 (A.376-377).

Mr. Hayes confirmed that the original construction permit approved the site for all types of wastewater in the region. *See* 3/12/19 Tr. at 95-96 (A.443-444). He explained the common sense principle that, after a construction permit is issued for a site, the permittee may obtain an amendment of the construction permit relating to design of the facility without re-doing the site evaluation work (such as an HSR or SWAR), unless the permittee seeks a fundamental change in the use of the site. *See id.* at 99-100 (A.447-448). Mr. Hayes identified three main system design changes in the permit amendment application for Phase I:

> [T]he lagoons that changed from three to two, the capacity of one had changed from 62 million to 90 million, they had reduced the amount of spray fields as far as spraying on them…and then they eliminated the wastewater treatment plant.

Id. at 48:16-24; 49:1-2 (A.396-397). When asked if these changes to the system design required Artesian to submit a new permit application, Mr. Hayes responded:

> No. We felt that there wasn't significant enough changes to require a new permit.

Id. at 76:18-20 (A.424). Artesian's permit amendment application was reviewed under Section 6.3.1.14.1 of the 2014 Regulations. *See id.* at 76 (A.424). Artesian had fully complied with the requirements of Section 6.3.1.14.1 because Artesian had submitted (1) a construction permit application, (2) a design engineer report, (3) plans and specifications, and (4) the applicable fees. *See id.* at 99:8-12 (A.447).

Mr. Hayes also testified about the requirement for an HSR or SWAR under the 2014 Regulations. When asked whether Section 6.5 of the 2014 Regulations required an HSR or SWAR, Mr. Hayes explained that:

> This pertains to new applications, a new permit application or a new project. It does not apply to existing in force permits.

See 3/12/19 Tr. at 71:9-12 (A.419).

The EAB also heard testimony from KOWC's witness Christopher Grobbel. Artesian objected to the scope of Mr. Grobbel's testimony because it went beyond the relevant issues as delineated by the EAB. 3/12/19 Tr. at 133:21-24;134:1-11 (A.481-482). The Chairman instructed KOWC that the testimony had to adhere to the evidence that was before the Secretary. *Id.* at 141:15-17 (A.489). Following Artesian's objection, DNREC moved for a directed verdict on whether an HSR and SWAR were required for the 2017 Permit Amendment application. *See id.* at 141 (A.489). The EAB went into executive session to consider the

motion and, upon returning, asked to hear legal argument from the parties. *See id.* at 145 (A.493). Following argument, the EAB returned to executive session. *See id.* at 175 (A.523). When the hearing resumed, the EAB voted unanimously to affirm the Secretary's Order. *See id.* at 176-177 (A.524-525).

On June 6, 2019, the EAB issued its written Decision and Final Order affirming the Secretary's Order. The EAB found that, as a matter of law, DNREC's determination that the changes in Artesian's permit amendment were not significant enough to require a new permit application was neither "unreasonable" nor "clearly wrong." EAB Decision at 12 (A.579). The EAB also found that Artesian had complied with the requirements of Section 6.3.1.14.1 for permit amendments by submitting the "plan[s], specifications and design engineer report." *Id.*

3. The Superior Court Appeal.

KOWC appealed the EAB's Decision and Final Order to the Superior Court of Delaware, on July 10, 2019. After the parties' submitted their respective briefing, the Superior Court affirmed the EAB's and Secretary's findings, on March 19, 2020. The Superior Court found that the 2014 Regulations did not require Artesian to start the permitting process from the beginning with an HSR and SWAR because Artesian had already "obtained" a construction permit. *See* Super. Ct. Op. at 23 (A.764). The Superior Court also found that there was

substantial evidence in the record that Artesian had complied with the requirements for a permit amendment and that the changes to ANSRWRF's design were not substantial enough to trigger a new permit. *Id.*

KOWC appealed the Superior Court's decision to the Supreme Court on April 10, 2020.

ARGUMENT

I. THE EAB'S DECISION IS BASED ON APPLICATION OF THE 2014 REGULATIONS TO THE 2017 CONSTRUCTION PERMIT AMENDMENT.

A. Question Presented

Whether the EAB's findings of fact and law are based on application of the 2014 Regulations to the 2017 Construction Permit Amendment?

Answer: Yes, the EAB's findings of fact and law were based on application of the 2014 Regulations to Artesian's application.

B. Scope Of Review

Where "the Superior Court has reviewed an administrative agency decision without receiving any evidence other than that presented to the agency [the Supreme Court] does not review the Superior Court's decision directly." *Del. Bd. of Med. Lic. & Dis. v. Grossinger*, 224 A.3d 939, 951 (Del. 2020). The Supreme Court "examines the agency's decision to determine whether the agency's ruling is supported by substantial evidence and free from legal error." *Id.* The record is considered "in the light most favorable to the prevailing party on the" administrative appeal. *Thompson v. Christiana Care Health Sys.*, 25 A.3d 778, 782 (Del. 2011).

C. Merits Of The Argument.

KOWC attempts–for the second time–to convince an appellate body that the EAB did not apply the 2014 Regulations to Artesian's 2017 Permit Amendment. The Superior Court had no trouble understanding from both the EAB's decision and the context of the parties' positions and arguments, that the EAB applied the 2014 Regulations in affirming the decision of the Secretary.[7] Specifically, the EAB held that, in order to amend an existing construction permit, the 2014 Regulations require the submission of some studies and reports (*e.g.*, a design engineer report) but not others (*e.g.*, an HSR or SWAR), unless the proposed changes are significant. KOWC continues to misunderstand or mistake the basis for the EAB's ruling.

The EAB affirmed the Secretary's Order based on two findings grounded in the 2014 Regulations. First, the EAB found that DNREC properly issued an amendment to Artesian's permit because Artesian "submitted the required plan, specifications and design engineer report contemplated by subsection *6.3.1.[].14[.1]*"[8] This is undeniably a citation to the 2014 Regulations. In fact, the 1999 Regulations did not include Section 6.3.1.14.1 or similar

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[7] *See* Super. Ct. Op. at 13 n.11 (A.754) (holding that "the fairest view of the EAB's ruling, when you consider the issues before it and its factual findings, is that" the ruling was made under the 2014 Regulations).

[8] EAB Decision at 12 (A.579).

language. Second, the EAB found that the "changes" to Artesian's permit were "not significant enough to require the applicant to submit a new permit application."[9] The reference to "changes" must be a reference to Section 6.3.1.14.1 of the 2014 Regulations:

> A construction permit application, plans and specifications and design engineer report with applicable fees must be submitted to the department if the construction permit has expired or ***changes have occurred***.[10]

Section 6.3.1.14.1 was the basis of the EAB's ruling that the permit amendment was proper, based on Artesian's compliance with that Section and the minimal extent of the "changes" requested by Artesian.

As the Superior Court noted, the "issues before" the EAB also reflect that the relevant analysis was under the 2014 Regulations.[11] Like it did before the Superior Court, KOWC again selectively quotes from a portion of the May 22, 2018 EAB hearing to suggest that DNREC incorrectly argued – and the EAB subsequently adopted in error – the position that the 2014 Regulations do not apply to permit amendments: "2014 amendments to the regulations do not apply to open

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9 *Id.*

10 7 *Del. Admin C.* § 7101-6.3.1.14.1 (emphasis added).

11 Super. Ct. Op. at 13 n.11 (A.754).

permits at the time the regulations were adopted…"[12] KOWC omits the question from the EAB that preceded DNREC's statement. Chairman Holden asked DNREC's counsel "Do the regulations, ***the 2014 regulations***, require that [the permit] be amended per the 2014 regulation requirements?"[13] The Chairman's question and DNREC's response presuppose the 2014 Regulations govern the amendment of Artesian's construction permit.[14] Tellingly, KOWC cites nothing in the record indicating that the EAB discussed, addressed or relied on any of the 1999 Regulations.

Faced with an overwhelming record that both the parties and the EAB operated with the understanding that the 2014 Regulations controlled, KOWC now argues for the *first* time that the EAB's decision should be remanded because its analysis of the 2014 Regulations was not "detailed."[15] This argument was not fairly raised before the Superior Court and is improper, under Supreme Court Rule

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12 O.B. at 19 (quoting 5/22/18 Tr. at 65 (A.196)).

13 5/22/18 Tr. at 65:1-3 (A.196) (emphasis added).

14 After Chairman Holden sought DNREC's position on whether the 2014 Regulations required permits to be amended according to provisions of the 2014 Regulations, the Chairman asked KOWC's counsel a pointed question: "So what level of change would require a redo under the ***new regulations***…" 5/22/18 Hr'g Tr. at 66:5-6 (A.197) (emphasis added). There was no misunderstanding by the EAB (or KOWC) as to whether the 2014 Regulations governed the permit amendment.

15 O.B. at 3.

8.[16] Second, KOWC misstates the applicable standard for remand under Section 10142(c) of Delaware's Administrative Procedures Act. Section 10142(c) provides that a reviewing court may remand a case back to the agency if "the record is insufficient for its review…" 29 *Del. C.* § 10142(c). The relevant case law – including the *Pepsi* decision on which KOWC relies – instructs that remand is appropriate where there is "*no* record" to support the agency's finding.[17] In *Pepsi*, for example, a transcript of the agency's hearing ruling was never prepared, making judicial review impossible.[18] In less extreme circumstances, Delaware courts have found that a case warrants remand if the agency fails to "address [the relevant] topic."[19] Conversely, where a court can "infer[] from the Board's conclusions what the underlying findings must have been," remand "would simply be an unnecessary formality."[20]

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16 *See* KOWC Superior Court Opening Brief (B005-B041); KOWC Superior Court Reply Brief (B043-B066).

17 *Pepsi Bottling Grp. Inc. v. Meadow*, 2009 WL 3532274, at *4 (Del. Super. Ct. Aug. 28, 2009) (emphasis added).

18 *Id.*; *see also Richardson v. Bd. of Cosmetology*, 69 A.3d 353, 358 (Del. 2013) (no "verbatim transcript" of the hearing before the Board was prepared).

19 *Tedesco v. Bayhealth Med. Ctr.*, 2015 WL 1199356 at *4 (Del. Super. Ct. Mar. 13, 2015).

20 *Keith v. Dover City Cab Co.*, 427 A.2d 896, 899 (Del. Super. Ct. 1981).

Here, the EAB's decision does not require remand. The EAB "addressed"[21] the relevant topic: whether Artesian was entitled to a construction permit amendment under the 2014 Regulations. Even if the decision is not the "model of clarity,"[22] a reviewing court can understand or "infer"[23] which regulations the EAB applied and the grounds for the ruling. The EAB provided a sufficient record for appellate review.

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21 *Id.*

22 Super. Ct. Op. at 13 n.11 (A.754).

23 *Keith,* 427 A.2d at 899.

II. THE EAB'S RULING IS BASED ON A CORRECT INTERPRETATION OF THE 2014 REGULATIONS AND ON SUBTANTIAL SUPPORTING EVIDENCE IN THE RECORD.

A. Question Presented.

Whether DNREC properly allowed the 2017 Construction Permit Amendment, which made site design changes that were not significant from a site selection or environmental impact perspective, without requiring the submission of a completely new permit application, including new site characterization reports such as an HSR and SWAR?

Answer: Yes, DNREC property granted an amendment to Artesian's construction permit without requiring an HSR or SWAR.

B. Scope Of Review

See Section I(B), *supra*.

C. Merits Of The Argument

The EAB's decision affirming the Secretary's Order does not constitute an error of law. The 2017 Permit Amendment was approved under the only reasonable and workable interpretation of the construction permitting process under the 2014 Regulations, which do *not* require an HSR or SWAR. In the alternative, to the extent the 2014 Regulations are susceptible to more than one reasonable reading, the 2017 Permit Amendment was approved under DNREC's interpretation of its own 2014 Regulations, which is afforded substantial deference

and controls unless it is irrational or "clearly wrong." Finally, the record contains substantial evidence that Artesian's application to amend its construction permit satisfied the requirements in the 2014 Regulations.

1. The EAB's Ruling Is The Only Reasonable Interpretation Of The 2014 Regulations.

Where regulations are clear and unambiguous, "the plain meaning of the [regulations] controls."[24] KOWC argues that the 2014 Regulations require the submission of an HSR and SWAR for all permit applications, regardless if it is for a new permit or to amend an existing permit. KOWC's interpretation would produce an impractical and unfair permitting process and defies the plain meaning of the relevant provisions.

a. Contrary To KOWC's Position, A Logical And Sensible Permitting Process Cannot Require A Complete Do-Over For Minor Changes.

The permitting process for wastewater treatment and disposal sites includes a construction permit phase followed by an operation permit phase.[25] Construction permitting includes site characterization to ensure an appropriate site

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[24] *Ins. Comm'nr v. Sun Life Assur. Co. of Canada (US)*, 21 A.3d 15, 20 (Del. 2011).

[25] *See* 7 *Del. Admin C.* § 7101-6.5.1. (Construction Permit); *id* at § 7101-6.5.3 (Operating Permit). This basic concept is employed in essentially all environmental permitting. For example, air quality construction permits precede air quality operations permits. *See, e.g.*, 7 *Del. Admin C.* § 1102-11.4); 7 *Del. Admin C.* § 1102-11.4.2.

has been selected (A.689, § 6.2 site characterization) and an initial design for the facility (A.696, § 6.3 Design Parameters). After a site is selected and approved by DNREC through issuance of a construction permit, it would be inefficient, illogical and unfair to require a permittee who wants to make changes in the facility design, which are not significant enough to raise issues about the location of the facility, to completely re-do all of the site characterization work.

As an initial matter, when Artesian first obtained its construction permit in 2013, Artesian complied with the applicable 1999 Regulations [26] that required an analysis as to whether the ANSRWRF site was appropriate for spray irrigation of treated wastewater.[27] The site was approved for a regional facility to handle all types of wastewater and up to 6 or 7 MGD. [28] Artesian's only requested amendment of its construction permit related to spray irrigation at ANSRWRF was to reduce the spray irrigation areas for Phase I.[29] The spray methodology, maximum amount of effluent, and total spray areas for all phases remained unchanged. Artesian's requested amendment fell within the approved uses of the site and was merely a change in timing that will initially use less area for disposal.

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26 The 1999 regulations were amended in 2014 to require the HSR and SWAR reports for new permit applications. *See* 7 *Del. Admin. C.* 7101-§ 6.5.

27 *See* 7 *Del. Admin. C.* §§ 7103-18.0-19.0; 21.0; 54-56; 60-61; 63; 67.

28 3/12/19 Tr. at 32-21-24 (380), 95-96 (A.443-444).

29 Sec. 2017 Order at 5-6 (A.072-A.073); 11 (A.078).

DNREC studied Artesian's application to amend its construction permit and determined, under Section 6.3.1.14.1 of the 2014 Regulations that there was no need to force Artesian to perform a second complete site characterization. KOWC argues that the 2014 Regulations *never* allow a permittee to amend (or make "changes" as KOWC calls it) a construction permit without completely re-doing the site characterization work, no matter how minor the requested design changes are. O.B. at 30 (asserting that the 2014 Regulations recognize only "permit applications," not amendments).[30] KOWC tries to soften this position by arguing that for permittees like Artesian who completed the site selection work prior to the 2014 Regulations, this would not be a complete do-over of the permitting process because it only relates to an HSR and SWAR. O.B. at 35-36. This reasoning fails logically and ignores the real world consequences to permit holders.

First, for permittees like Artesian, KOWC's interpretation *would* require a do-over because the site selection work was completed and approved in the initial permitting process, not as part of the amendment application. Second, construction permit holders do not wait to find out if the regulations for their site

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30 When questioned by Chairman Holden, KOWC's counsel acknowledged only one instance, from federal law, where a re-do would not be required: a change in ownership without design changes. 5/22/18 Hr'g Tr. at 66-67 (A.197-198).

will change. Permit holders proceed with construction. Artesian invested in the development of the ANSRWRF site based on DNREC's approval of the construction permit.[31] Artesian's requested changes for the amended construction permit fell within the overall uses DNREC had already approved for the site.[32] Requiring a construction permit holder to start over – ignoring previous approvals of the site – and seek a new site approval under new regulations, which could potentially result in disapproval of the site causing loss of the permit holder's investment, would be a harsh, unfair and nonsensical result which no agency or its regulations could ever support or require.

b. Section 6.3.1.14.1: Only Significant Amendments To Design Require A New Permit Application.

Section 6.3.1.14.1, found under the system "design" part of the 2014 Regulations, requires certain submissions where a construction permit has expired or changes to system design have occurred:

> A construction permit application, plans and specifications and design engineer report with applicable fees must be submitted to the department if the construction permit has expired or changes have occurred.

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31 *See* n.3 *supra.*

32 *See* 3/12/19 Hr'g Tr. at 95:9-24; 96:1-2.

7 *Del. Admin. C.* § 7101-6.3.1.14.1. KOWC disputes that this section (or any section) addresses or allows construction permit amendments. (O.B. 29). As explained above, that is unreasonable on its face because no agency would adopt rules forbidding all amendments and requiring complete do-overs for even insignificant changes.[33] KOWC's reading also does not comport with the plain language of this regulation. Section 6.3.1.14.1 refers to "expired" permits and "changes." If a permit has "expired," it must, by logical necessity, have been previously issued. If previously issued, it is not new. Similarly, the references to "changes" also must mean changes to an existing permit. In other words, this section logically must refer to *amending* a permit.

For expired or amended permits, Section 6.3.1.14.1 spells out, in plain terms, the types of submissions a permittee must submit: "a construction permit application, plans and specifications and design engineer report…" 7 *Del. Admin C.* § 6.3.1.14.1 Glaringly absent is any mention of an HSR or a SWAR.[34] The

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[33] As KOWC points out, the 2014 Regulations do allow amendments to operating permits under Section 6.5.3.3.1. *See* O.B. at 28. It would make no sense if the 2014 Regulations allowed amendments at the operations phase but not at the construction phase.

[34] An additional reason that the HSR and SWAR do not appear in Section 6.3.1.14.1 is because this provision is under the system "design" part of the 2014 Regulations. The HSR and SWAR, defined in Sections 6.2.3 and 6.2.4, respectively, are under the "site characterization" part of the 2014 Regulations. There were no changes to site selection in Artesian's permit amendment. *See* 3/12/19 Tr. at 83:24-84:1-3 (A.431-432). The only

only reasonable reading – held by DNREC and the EAB – is that permit amendments do *not* automatically require an HSR or a SWAR.

An unexpired permit cannot be amended under Section 6.3.1.14.1 only if the changes are significant. This is obvious because "changes" come in many shapes and sizes and not every amendment could be significant enough to require a completely new construction permit application, including a complete re-characterization of the site. For example, changing the name of the facility or moving the location of a single pipe by a few yards could not warrant re-doing site characterization studies. Determination of when an amendment is significant enough to require starting over with a new permitting process under Section 6.3.1.14.1 is left to the discretion of DNREC.[35]

(. . . continued)

additional work required by DNREC, as exemplified by Ms. Baust's memo, was to confirm compliance with provisions relating to the design of the system. *Id.* at 101:4-25; 102:1-23 (A.449-450). KOWC attempts to argue that the HSR and SWAR, although part of the site selection process, are also "central" to the design phase because Section 6.3.13 provides that "permit applications must demonstrate that the system is designed in accordance with the prescribed system type" in the HSR and SWAR. O.B. at 34-35. This overstatement inflates the significance of Section 6.3.13. That the system design must keep in mind the selected site is an obvious point. This cannot mean that an HSR or a SWAR must always be required for permit amendments.

[35] KOWC does not challenge DNREC's exercise of discretion concerning whether Artesian's amendment included changes significant enough to

c. Section 6.5: HSR And SWAR Reports Are Required For Initial Permit Applications, Not Amendments, Unless The Changes Are Significant From A Site Selection Perspective

KOWC's interpretation that Section 6.5 applies to all applications is also contrary to the plain regulatory language:

> In order to obtain a permit to construct and operate an on-site wastewater treatment and disposal system….a permit application must be submitted to the Department for review and approval. A permit application will not be reviewed by the Department until the SIR, HSR, and SWAR have been reviewed and approved by the department.

7 *Del. Admin. C.* § 7101-6.5. KOWC reads Section 6.5 to mean that no application will be reviewed, whether to issue a new permit or makes changes to (amend) an existing permit, without submission of an HSR and SWAR. KOWC is correct that Section 6.5 includes language requiring an HSR and SWAR prior to review and approval of a "permit application." *Id.* But that application is for a *new* permit. KOWC ignores the first part of Section 6.5: "[i]n order to ***obtain*** a permit to construct and operate an on-site wastewater treatment and disposal system…a permit application must be submitted to the Department…" *Id.* "Obtain" obviously connotes acquiring a permit in the first instance, not amending an

(. . . continued)

require a new permit. KOWC, instead, argues only that new permits are always required.

existing permit. "Obtain" signifies that a permit is yet to issue and, therefore, Section 6.5 applies to new permit applications.[36] Section 6.5's clear and unambiguous meaning is that new permit applications, as opposed to applying to amend an existing permit, require HSR and SWAR submissions.

As the Superior Court recognized, Section 6.1 further supports the distinction between new and existing construction permits.[37] Section 6.1, like Section 6.5, provides that a "permit must be ***obtained*** from the Department prior to the construction" of a large wastewater treatment system.[38] This also reflects that once a construction permit is obtained, there is no blanket rule requiring a permittee to start the process from the beginning and obtain a second, new permit – including with an HSR and SWAR – simply to make changes to the existing construction permit.

Finally, the only reasonable interpretation of Sections 6.1 and 6.5 is also consistent with the presumption against the retroactive application of

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[36] KOWC clings to the definition of "permit" in Section 2.0 to argue that all permit applications are only for permits, not permit amendments. KOWC argues that because "permit" is defined as "authoriz[ing] the installation of any system" all activities in connection with a system must be authorized through a permit. O.B. at 31. This presupposes that no permit amendments are allowed under the 2014 Regulations, a position that is belied by Section 6.3.1.14.1, which allows permit amendments to an already permitted system.

[37] Super. Ct. Op. at 17 (A.758).

[38] 7 *Del. Admin C.* § 7101-6.1 (emphasis added).

regulations. The 1999 Regulations under which Artesian's original construction permit issued indisputably did not require an HSR or SWAR. Those two reports were added in 2014. Nothing in the 2014 Regulations suggests retroactive application of the HSR and SWAR requirements. Artesian already obtained approval for the site. Artesian's application to make design changes fell within the approved uses for the site. KOWC wants the requirement imposed by the 2014 Regulations to submit an HSR and SWAR to apply to a site that was already approved under the 1999 Regulations. Under these circumstances, amended regulations do not apply retroactively. *See Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1998) ("administrative rules will not be construed to have a retroactive effect unless their language requires this result"); *Davis v. Mountaire Farms, Inc.*, 551 F. Supp. 2d 343, 348 (D. Del. 2008) ("regulations are generally not given retroactive effect…."). Requiring an HSR or SWAR for a permit amendment would amount to an impermissible retroactive application.

2. In The Alternative, DNREC's Interpretation Of The 2014 Regulations Is Afforded Deference And Controls Because It Is Reasonable And Not Clearly Wrong.

To the extent there is any ambiguity as to whether Section 6.3.1.14.1 or Section 6.5 requires an HSR or SWAR for permit amendments, this ambiguity is resolved by deference to an agency's interpretation of its own rules. *See Couch v. Delmarva Power & Light Co.*, 593 A.2d 554, 562 (Del. Ch. 1991) ("it is basic that

courts should defer to judgments of an administrative agency as to the meaning or requirements of its own rules where those rules…are ambiguous"). Because DNREC's interpretation, adopted by the EAB, is "rational[]" and not "clearly wrong," it is afforded deference and controls. *Ramsey v. DNREC*, 1997 WL 358312, at *3 (Del. Super. Ct. Mar. 20, 1997).

KOWC suggests that neither DNREC nor the EAB deserve deference because their interpretation of the relevant regulatory provisions is contrary to those that were "adopted." O.B. at 34. KOWC relies on the Delaware Supreme Court's *Garrison v. Red Clay Consolidated School District* decision for this proposition. *Garrison* is wholly distinguishable. There, the Supreme Court held that a school district's interpretation of one rule could not be "reconciled" with another rule. *Garrison*, 3 A.3d 264, 266 (Del. 2010). Specifically, the rules pertained to the classification of teachers by levels of experience. *Id.* The Delaware Supreme Court found that the School District's interpretation of the first teacher classification would mean that "no one would qualify" for the second classification. *Id.* at 269.

KOWC points to no irreconcilable regulations as a consequence of DNREC and the EAB's interpretation of DNREC's 2014 Regulations. Although KOWC argues that having one rule for applications under Section 6.3.1.14.1 and

one rule for applications Section 6.5 is "unharmonious," and "unreasonable"[39] the opposite is true. Under DNREC's interpretation, Section 6.3.1.14.1 applies to permit amendments, while Section 6.5 applies to new permits. That a permit amendment requires only some reports and studies, while a new permit requires a more comprehensive set is internally consistent and logical.

According to KOWC, all permit applications, whether for amendments or new permits must include HSR and SWAR submissions. KOWC's competing interpretation shows – at best – that there are two reasonable readings of Section 6.3.1.14.1 and Section 6.5. An alternative reasonable reading is not sufficient to defeat the deference given to DNREC's interpretation. The Court of Chancery was faced with similar competing interpretations of an agency's rules in *Christiana Town Center, LLC v. New Castle County.* The parties disagreed whether a traffic impact study had to be submitted in connection with redevelopment plans under the New Castle County Unified Development Code. *See Christiana*, 2009 WL 781470, at *1 (Del. Ch. Mar. 12, 2009). Then Vice-Chancellor Strine resolved the competing proposals, both of which he found to be reasonable, by giving deference to the County Council – the agency which drafted the Code. *See id.* at *8 ("Here, the County Council, which enacted the UDC, determined that…a TIS is not required…I defer to New Castle County's

[39] O.B. at 37.

interpretation…"). KOWC has no credible argument for why the result should be different here.

Additional statutory construction factors support DNREC's (and the EAB's) interpretation of the relevant regulations. KOWC supports its reading of the 2014 Regulations by citation to the longstanding adage that regulations must be read together to provide a "harmonious whole" and that no regulation should be "construed as surplusage." O.B. at 24 (quoting *Garrison*, 3 A.3d at 276). It is KOWC's reading of Sections 6.3.1.14.1 and 6.5 that violates this rule of statutory construction. KOWC argues that Section 6.5 applies to all permit applications, regardless if they are for a new or existing system. If that is the case, then there is no reason for Section 6.3.1.14.1 to exist. Section 6.3.1.14.1 provides that if a permit has expired or changes have occurred, a permittee must submit a design engineer report as well as plans and specifications. If Section 6.5 covers all applications, then DNREC would not need to specify the required submissions for expired permits and changed designs in Section 6.3.1.14.1. KOWC's interpretation of Section 6.5 does more than render Section 6.3.1.14.1 meaningless surplusage, it creates a conflict. Section 6.5 would always require an HSR and SWAR for any application, while 6.3.1.14.1 would not. Tellingly, KOWC attacks DNREC's interpretation of the Section 6.3.1.14.1 by arguing that Section

6.3.1.14.1 does not allow permit amendments, but KOWC never provides an interpretation of what Section 6.3.1.14.1 does mean. O.B. at 28-29.[40]

KOWC's reading of Section 6.5 is also contradicted by provisions in the 6.5 family. Section 6.5.2.2.2 provides that if "construction has not been initiated prior to the expiration of the construction permit, and there are proposed changes to the approved design" the applicant "must submit…construction plans as outlined in Section[] 6.2.3…" 7 *Del. Admin. C.* § 7101-6.5.2.2.2. Section 6.2.3 describes the requirements and contents of an HSR. If, as KOWC contends, Section 6.5 refers to all permit applications, then DNREC would not have needed to specify an additional, specific instance where an applicant must submit an HSR. In 6.5.2.2.2, the trigger is a combination of the expiration of a construction permit before construction has begun and changes in the approved design.[41]

KOWC next argues that the 2014 Regulations do not make a distinction between permit amendments and new permits for purposes of

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[40] KOWC's interpretation also violates the axiom of regulatory construction that to include one thing in a list is to exclude other things that are not listed. Section 6.3.1.14.1 lists several specific things that must be submitted, and an HSR and SWAR are not enumerated.

[41] This section does not apply to Artesian's application for an amended construction permit. It is undisputed that Artesian's construction permit had not expired and construction had started prior to Artesian applying for the amendment. *See* 3/12/19 Hr'g Tr. at 76:1-3 (A.424) (Mr. Hayes confirms the 2013 Permit had not expired); *see also* n.3 *supra*.

submitting an HSR or SWAR because DNREC did not use the term "new permit" or "existing permit" in Section 6.5. KOWC points to all the instances it could find in the 2014 Regulations where the word "new" or "existing" appears, suggesting that the omission of "new" or "existing" in Section 6.5 is dispositive.[42] It is not.

First, and as KOWC concedes, these provisions all relate to new or existing wastewater "systems or facilities" – not *permits*.[43] Under KOWC's own highly technical reading of the 2014 Regulations this distinction is key, and those provisions are irrelevant to an analysis of *permit* requirements. Second, KOWC cites to the definition of "new system" under Section 2.0, but KOWC misses its import. That definition expressly excludes "[a]n expansion of an existing (in place) system" and "any modification of treatment or disposal methodologies."[44] A permit amendment obviously could seek an expansion of the facility or a modification of a treatment or disposal methodology. In other words, the definition of "new system" supports, rather than undermines the point that permit amendments are contemplated by and distinct from new permits and systems under the 2014 Regulations. Third, Section 6.5 may not use the term "new" but that meaning is, nonetheless, clear. As already explained, Section 6.5 speaks in terms

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42 O.B. at 33 n.15.

43 O.B. at 33.

44 7 *Del. Admin. C.* § 7101-2.0.

of obtaining a construction permit: "[i]n order to ***obtain*** a permit to construct…" 7 *Del. Admin. C.* § 6.5 (emphasis added). There is no reasonable way to interpret this language, other than it refers to a new permit and not to permit amendments. Amendments are made to permits that have already been obtained.[45]

Adopting KOWC's interpretation would also violate the policy behind the 2014 amendments. KOWC makes much of the Foreword to the 2014 Regulations and DNREC's stated policy behind the amendments, suggesting that DNREC's sole focus was to improve site evaluation and siting issues.[46] What KOWC omits is that the "Department's policy" in promulgating the 2014 Regulations was also to "encourage development of new systems, processes and techniques which may benefit significant numbers of people in Delaware." *See* A.622. If KOWC's reading of Sections 6.3.1.14.1 and 6.5 controls, then this policy will be hindered, rather than encouraged. Under KOWC's view, any

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45 Along the same lines as its arguments regarding provisions that refer to "new" systems, KOWC also references provisions of the 2014 Regulations which speak in terms of mandatory and discretionary actions. *See* O.B. at 34 n.16. Because Section 6.5 includes a mandatory pronouncement that a permit application "will not" be reviewed without an HSR or SWAR, KOWC argues that DNREC does not have the discretion to waive the requirements of Section 6.5. Artesian does not dispute that an HSR or SWAR must be submitted with a *new* permit application. But KOWC's argument presupposes that Section 6.5 governs permit amendments. As explained above, it does not.

46 O.B. at 34-35.

modification, including moving a pipe ten feet, could require a new permit application – a complete site selection do-over, even for projects that have no site selection or siting deficiencies. This would chill developers of wastewater systems, like Artesian, from investing in Delaware's infrastructure for fear that any change, no matter how small, could delay construction and require starting anew. ANSRWRF will benefit the community and surrounding region by removing the Allen Harim effluent from the Broadkill River watershed and repurposing it for spray irrigation on crops. It is decidedly not in the best interest of "significant numbers of people in Delaware" to delay or thwart this type of wastewater disposal.

3. The EAB's Decision Is Supported By Substantial Evidence And The Case Should Not Be Remanded To Supplement The Record.

a. The EAB's Decision Is Supported By Substantial Evidence In The Record.

Based upon the only reasonable interpretation of Section 6.3.1.14.1 – or, in the alternative, one that is given deference because it is not clearly wrong – the EAB (and the Superior Court) affirmed the Secretary's holding that the amendment to Artesian's permit was proper. This was based on two findings: (1) Artesian submitted the necessary construction permit application, design engineer report, plans and specifications and fees; and (2) the proposed design changes to

the original construction permit were not significant enough to require a new permit. These findings are based on the substantial evidence in the record and should not be disturbed.

First, it is uncontested that Artesian submitted the necessary construction permit application, design engineer report, plans and specification and fees, under Section 6.3.1.14.1. DNREC witness Jack Hayes testified to this fact at the March 12, 2019 hearing[47] and KOWC's concedes this point in its opening brief.[48] This finding meets the substantial evidence standard.

Second, the record contains substantial evidence that the design changes in Artesian's permit amendment are not significant enough to warrant a new permit. Even if KOWC disputes the characterization of the extent of the changes, DNREC is afforded deference in interpreting and applying the regulations it drafted, unless clearly wrong. *See Couch*, 593 A.2d at 562 (agency's "determination" made under its own rules will not be "struck down," unless "no rational person could, under any responsible interpretation of the regulation" come to that determination). DNREC's interpretation and application were not clearly wrong.

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47 *See* 3/12/19 Tr. at 99:8-12 (A.447).

48 *See* O.B. at 26.

The first design change in Artesian's permit amendment is to increase the size of the on-site wastewater storage pond from 62 million gallons to 90 million gallons. *See* Sec. 2017 Order at 5 (A.072). The Secretary found that this change was not significant because the pond remains on the same 75 acre parcel on which it was originally approved. *Id.* In addition, the size of the pond is similar to other farm ponds and "will have a landscaped buffer," mitigating concerns over land disturbance. *See* H.E. Rep. at 15 (A.094). These facts adequately support the conclusion that the change to the pond was not significant for site selection and characterization purposes.

The second design change in Artesian's permit amendment is to delay the construction of the wastewater treatment plant in favor of having the wastewater treated at the Allen Harim plant.[49] *See* Sec. 2017 Order at 5 (A.072). Rather than being a significant change requiring a new permit amendment, deferring the construction of a treatment plant at ANSRWRF "will reduce the amount of disturbance" on the ANSRWRF site during Phase I. *Id*. DNREC witness Jack Hayes also testified that this change will improve the quality of the wastewater being sprayed at ANSRWRF because Allen Harim is required to treat the wastewater to an unlimited public access standard. This is a higher standard

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[49] KOWC did not object to or appeal Allen Harim's permit for the treatment it will perform, which DNREC has granted.

than what Artesian would have been required to meet. *See* 3/12/19 Tr. at 79:9-13 (A.427) ("the wastewater that's coming from Allen Harim is a much higher quality than what would probably be coming from the Artesian plant that was proposed"). It is also reasonable – or at least far from clearly wrong – to decide that these improvements and reductions in impact are not the type of changes requiring an existing permittee to start from scratch.

The third and final design change concerns the spray irrigation fields on the ANSRWRF site. Specifically, the permit amendment "reduces the number of spray irrigation areas…" for Phase I. Sec. 2017 Order at 7 (A.074). This was found to be a "minor" modification. H.E. Report at 13 (A.092). Importantly, the amendment did not change the original planned acreage for the spray fields or the volume of the wastewater to be sprayed on the fields. *See* 3/12/19 Tr. at 83:21-23 (A.431); 78:4-8 (A.426). The evidence supports a "rational" interpretation under Section 6.3.1.14.1 that this change did not rise to the level of a new permit application or any need to re-evaluate the suitability of the site.

b. The Case Should Not Be Remanded To Supplement The Record With Additional Evidence.

Despite the substantial evidence in the record supporting the Secretary's Order and the EAB's decision, KOWC asserts that the record is incomplete. KOWC claims the case should be remanded for additional

presentation of evidence because the EAB prevented KOWC from completing its "case-in-chief," during the March 12, 2019 hearing.[50] This appeal point has multiple, fatal flaws.

As an initial matter, this appeal point is not properly before this Court because KOWC never raised this argument when it appealed the EAB's decision to the Superior Court.

KOWC's primary complaint relates to the testimony of its expert witness Mr. Grobbel. Following an objection from Artesian at the March 12, 2019 hearing, the EAB precluded further testimony from Mr. Grobbel regarding the component parts of the HSR. The EAB excluded Mr. Grobbel's testimony based upon its prior ruling during the May 22, 2018 hearing, which granted DNREC's motion in limine.[51] The motion in limine decision limited the evidence at the hearing to "the evidence before the Secretary."[52] As Counsel for the EAB explained, the scope of Mr. Grobbel's testimony was beyond the evidence that was before the Secretary, which is impermissible under Section 5.3 of the EAB's

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50 O.B. at 41.

51 *See* 3/12/19 Hr'g Tr. at 134:17-24; 135:1 (A.482-483) (Chairman Holden instructing KOWC's counsel to "steer [KOWC's] witness" to the topics properly before the EAB, as determined by the "motion in limine").

52 *See* EAB Decision at 8(A.575).

regulations.[53] The record before the Secretary confirms this, as neither Mr. Grobbel, nor anyone else on KOWC's behalf testified at any public hearing regarding the composition of the HSR before the Secretary approved Artesian's amended construction permit.[54]

In its Superior Court opening brief, KOWC acknowledged that the motion in limine ruling became final upon the EAB's written decision.[55] Indeed, the decision itself memorializes the ruling.[56] Title 7, Section 6009 of the Delaware Code required KOWC to appeal the EAB's decision to the Superior Court – including the ruling on the motion in limine which precluded Mr. Grobbel's testimony – within 30 days.[57] Although KOWC appealed the EAB's written decision to the Superior Court within that time frame, none of KOWC's appeal

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53 *See* 3/12/19 Hr'g Tr. at 138:17-22 ("Rule 5.3 of the board's regulations…says that appellants other than permit applicants or an alleged violator may only introduce evidence that was before the secretary"); *See also* 7 *Del. Admin C.* §105-5.3 ("The record before the Board includes the entire record before the Secretary").

54 *See* n.4 *supra.*

55 Super. Ct. O.B. at 2 (May 22, 2018 ruling on the Motions in Limine "was not a final order" without "a written decision") (B011); *see also* 29 *Del. C.* §10128(b) (requiring a "final order").

56 *See* EAB Decision at 8 (A.575)("The Board voted 6-0 to grant DNREC's Motion in Limine 'such that the evidence presented must be limited to evidence before the Secretary…'").

57 *See* 7 *Del. C.* §6009(a).

points related to the motion in limine or Mr. Grobbel's testimony.[58] Having failed to timely appeal the motion in limine ruling, KOWC has waived any argument that the record should be reopened and supplemented by Mr. Grobbel's testimony.[59] Any presentation of this argument to this Court is improper under Supreme Court Rule 8 because it was not fairly raised before the Superior Court. *See* Supr. Ct. R. 8.

Even if KOWC has not waived its argument, the exclusion of Mr. Grobbel's testimony is not grounds for remand. The EAB acted within its discretion to exclude Mr. Grobbel's testimony, both because the testimony was beyond the evidence before the Secretary *and* because the governing statute and regulations give the EAB authority to exclude "irrelevant" and "immaterial" evidence.[60] As represented by KOWC's counsel, Mr. Grobbel's unfinished testimony related to the necessary parts of the HSR.[61] The purpose of the testimony was to compare an HSR study to the analogous studies under the 1999

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58 *See* Super. Ct. O.B. (B005-B041).

59 The only reference to the preclusion of Mr. Grobbel's testimony was in a footnote in KOWC's reply brief before the Superior Court. *See* Super. Ct. R.B. at 16 n.15 (B062). This is not sufficient to constitute an appeal of the motion in limine decision.

60 *See* 7 *Del. C.* §6008(b) ("The Board may exclude any evidence which is plainly irrelevant, immaterial…"); 7 *Del. Admin C.* §105-5.5 (same) .

61 3/12/19 Hr'g Tr. at 135:12-13 (A.483).

Regulations.[62] Chairman Holden made clear that the EAB was excluding Mr. Grobbel's testimony because the EAB did not require it:

> So, if the board believes that an HSR wasn't required, what's the purpose of the testimony?

3/12/19 Hr'g Tr. at 137:12-14 (A.485). In other words, Mr. Grobbel's testimony was "irrelevant" and "immaterial" to the EAB's evaluation of the Secretary's Order, because the question was whether the HSR applied at *all* to the 2017 Permit Amendment – not if the previous studies were sufficient. Based on the exclusion of this testimony, DNREC moved for a directed verdict based on evidence already in the record.[63]

KOWC is also not aided in its request for remand by its cherry-picked statements from the Superior Court's opinion. The Superior Court noted that under *different* circumstances, additional evidence might be needed to resolve construction permitting issues. For example, the Superior Court remarked that more analysis of the number of test borings required by an HSR could "change the analysis" but "that is purely ***speculative*** at this point." Super. Ct. Op. at 16 (A.757)

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62 *Id.* at 137:8-11 (A.485).

63 KOWC argues that allowing a motion for directed verdict was improper under traditional evidentiary rules. The EAB is not bound by traditional rules of evidence. *See* 7 *Del. Admin C.* §105-5.2 ("Strict rules of evidence shall not apply"). The EAB was within its discretion in determining that, after two separate and full hearings, it had sufficient evidence to make a ruling on the relevant issues in the case.

(emphasis added). It is "purely speculative" because the EAB did not need to consider the number of test borings required by an HSR. The EAB ruled that an HSR is not needed for Artesian's permit amendments. Similarly, the Superior Court noted – hypothetically – that changes to a system's design could require more testing of drinking water. *Id.* at 23 (A.764). Neither of these statements constitute a finding that more evidence was needed in *this* case. Rather, the Superior Court (like the EAB) found that there was substantial evidence in the record to support the Secretary's decision that the design changes to Artesian's construction permit were not significant enough to warrant a complete do-over of the site selection process.

CONCLUSION

As discussed above, the Court should affirm the decision of the EAB and the Superior Court.

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