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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 Below, Appellants,	)	
v.	)	No. 138,2020
DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL, and ARTESIAN WASTEWATER MANAGEMENT, INC., Appellees Below, Appellees.	)	

APPELLANTS' CORRECTED REPLY BRIEF

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ARGUMENT

The language of the EAB Order and 2014 Regulations is clear. DNREC and Artesian attempts to obfuscate the issues—by mischaracterizing Appellants' arguments, improperly adding terms and provisions, and misstating the law—fail.

I. THE EAB ERRED WHEN IT FOUND THAT THE 2014 REGULATIONS DID NOT APPLY TO THE APPLICATION FOR AND ISSUANCE OF THE 2017 PERMIT.

The EAB Order plainly states: "The Board agrees with DNREC and Artesian's contention that, as a matter of law, the 2014 regulations do not apply to the amendment to the existing construction permit." EAB Order at 12 (A. 579). Appellants need not "attempt to convince" this Court, Artesian Br. 18, the EAB so ruled; this explicit statement speaks for itself. Artesian's "proof" otherwise merely underscores the point.[1] "Inferring," Artesian Br. 21, an extensive discussion of multiple 2014 Regulations provisions from a few cryptic words seems especially strained. If proof of the Board's finding beyond its own language is necessary, it is found in DNREC's fulsome (though unpersuasive) argument supporting the Board's conclusion that the 2014 Regulations do not apply. DNREC Br. 15-27. Appellants

[1] Artesian rewrites the EAB Order's reference to non-existent § 6.3.1.1.14 to fit the 2014 Regulations, Artesian Br. 18, but fails to square it with the Board's express finding. Citing a question from the Board's Chair, Artesian Br. 19-20, is even less compelling; it is not in the Board's final decision, and if mere reference to the 2014 Regulations means the Board is applying them, one ends up with the absurdity that the Board's actual conclusion above means that the Board applied the 2014 Regulations in holding the 2014 Regulations do not apply.

argument is straightforward: The Board's express conclusion that the 2014 Regulations do not apply can and should be taken at face value. Artesian offers no supported reason why that issue is not present before this Court.

While Artesian does not cite or defend the Board's express finding, DNREC does, DNREC Br. 18-19, in an externally and internally inconsistent argument. DNREC states "it is undisputed that ANSRWRF as a facility and a project are governed by the 2014 Regulations," DNREC Br. at 17—thereby contradicting the Board. DNREC's citations to numerous 2104 regulatory provisions it supposedly applied (dealt with in this brief's next section) underscore this contradiction. DNREC then contradicts itself by stating "[a]s the 2014 Regulations are not retroactive, review of an application to amend the 2013 Construction Permit is governed by the regulations in effect at the time the permit was granted." *Id.* In DNREC's confusing view, the 2014 Regulations both apply and do not apply in this case.[2]

DNREC's fundamental flaw is that, by mischaracterizing the 2017 Permit as an "amendment" of the 2013 Permit,[3] it mistakenly believes the relevant time period

[2] This confusion is best exemplified by DNREC's assertion that "Appellants conflate DNREC's regulatory interpretation that the *substantive* review of the Amendment Application is subject to the regulations in effect at the time of the initial permit Amendment Application, and DNREC's decision to consider and employ the *substantive* requirements of the 2014 Regulations in reviewing the application." DNREC Br. 22 (emphasis supplied).

[3] The "amendment" argument is dealt with in Part II.B of this brief.

is 2013. DNREC's retroactivity argument—its justification for using pre-2014 regulations—rests on this notion: "applying a 2014 regulation to a 2013 permit is, by definition, retroactive." DNREC Br. 22.[4] However, the retroactivity argument is deficient for at least five reasons.

First, the action to which the 2014 Regulations applies occurred *in 2017*—when Artesian submitted its 2017 Permit Application. Artesian needed DNREC's approval to do something different than what the 2013 Permit allowed; if the 2013 Permit already allowed Artesian to accept industrial wastewater treated by Allen Harim, the 2017 permit process was unnecessary. That both DNREC and Artesian thought otherwise and engaged in the process puts the focus squarely in 2017. Application of regulations to events three years after their promulgations is, by definition, *not* retroactive.

Second, DNREC quotation from *Hubbard v. Hibbard Brown & Co.*, 633 A.2d 345, 354 (Del. 1993), includes this Court's language that statutes can be retroactively applied when "there is a clear legislative intent to do so." DNREC Br. 23.[5] Section 1.3 of the 2014 Regulations explicitly states that

[4] Artesian also raises retroactivity, Artesian Br. 32—which seems inconsistent with its view that only the 2014 Regulations need be considered. Regardless, its argument suffers from the same deficiencies listed here.

[5] Artesian's authority recognizes the same exception. *See Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1998) (retroactivity permitted if statute "requires this result").

> These Regulations shall supersede and replace the Regulations Governing the Design, Installation and Operation of On-Site Wastewater Treatment and Disposal Systems and the Guidance and Regulations Governing the Land Treatment of Wastes, Part II.

§ 1.3 (A. 623).[6] The "supersede and replace" language means only the 2014 Regulations apply going forward—i.e., every regulatory action is and must be governed by the 2014 Regulations. Indeed, because the 2014 Regulations "replaced" the prior regulations, it would be impossible for DNREC in 2017 to make a decision applying pre-2014 regulations because they no longer exist. DNREC wholly fails to explain how it could do so.[7]

Third, DNREC does not and cannot point to a 2014 Regulations provision requiring application of the "regulations in effect at the time a prior permit was issued"—because no such provision exists. DNREC's discretion does not extend to making up wholly new and inconsistent regulatory provisions. "Deference to an administrative agency's interpretation of its regulations cannot go so far as to authorize a regulation other than the one that was duly adopted." *Garrison v. Red Clay Consol. School Dist*., 3 A.3d 264, 269 (Del. 2010).

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[6] Throughout this brief, 2014 Regulation citations are to sections found in 7 Del. Admin. Code 7101.

[7] Likewise, DNREC's response to Appellant's citation of § 6.3.1.8's 12-month grace period, DNREC Br. 23-24, misses the point. Section 6.3.1.8 shows that DNREC (as author of the 2014 Regulations) knew how to call out different treatment for systems permitted prior to 2014. That no such call out exists for application of regulations existing at the time of a pre-2014 permit shows DNREC did not include that concept in the 2014 Regulations DNREC claims it applied.

Fourth, while DNREC confusingly claims it was applying both the 2014 and pre-2014 regulations, it provides no valid record support of the latter.[8] Everything in the record—the Baust Memo reviewing the Artesian Application at 2 (A50), The Hearing Officer's Report at 12 (A. 91), the Secretary's Order at 4 (A. 71), permit signer Jack Hayes' testimony under DNREC counsel's questioning (A. 420)—prove DNREC *only* applied the 2014 Regulations. In light of this evidence, DNREC's claim about its "administratively complete" determination without an HSR and SWAR, DNREC Br. 19 and 25, is "absolute" or "irrefutable" evidence of nothing (except, Appellants suggest, DNREC's legal error in misinterpreting the 2014 Regulations' requirements concerning HSRs and SWARs). Quite simply, there is no evidence DNREC did what it now claims it did.

Fifth, if DNREC's argument is correct—that the 2017 permit application had to be considered under the regulations in effect in 2013 and not the 2014 Regulations—the record shows the 2017 permit review was done in clear legal error. As the Hearing Officer expressly found, DNREC reviewed the application under the 2014 Regulations "**as opposed to the Department's regulations in effect when the Department issued the 2013 Construction Permit**," H.O. Report at 12 (A. 91)

[8] DNREC's Statement of Facts does claim Mr. Hayes "confirmed the amended permit was considered under the former regulations," DNREC Br. 11, *citing* (A. 431). However, **nothing** on the page of Hayes' testimony at A. 431 (or elsewhere, for that matter) says anything of the kind.

(emphasis supplied). This express finding—incorporated into the Secretary's Order via Finding #5 (A. 79)—means the review DNREC asserts must be done never occurred. If DNREC is right, the EAB's decision should be reversed for that reason alone.

Appellants, Artesian, the Superior Court, and at least one side of DNREC's argument all agree that the 2014 Regulations should control the review of the 2017 Permit. That the EAB expressly concluded otherwise means the EAB erred. The decision should therefore be reversed and remanded.

II. THE EAB ERRED WHEN IT "HELD" THAT THE 2014 REGULATIONS DID NOT REQUIRE AN HSR AND SWAR BE PREPARED BEFORE DNREC CONSIDERED ARTESIAN'S 2017 PERMIT AMENDMENT APPLICATION.

Appellants' argument on the second issue in this appeal is straightforward:

- The parties, Secretary, Hearing Officer, and Superior Court all agree that § 6.3.1.14.1 of the 2014 Regulations applied to the decision on Artesian's 2017 permit application.

- § 6.3.1.14.1 requires submission of a "construction permit application" if "changes have occurred" to an LOWTDS design.

- Artesian submitted a "construction permit application" to DNREC (A. 1-2) to start the 2017 permitting process.

- § 6.5 of the 2014 Regulations requires that "A permit application will not be reviewed by the Department until the SIR, HSR, and SWAR have been reviewed and approved by the Department."

- DNREC reviewed Artesian's 2017 construction permit application, and issued the 2017 Permit, without any HSR or SWAR from Artesian.

- DNREC therefore violated the 2014 Regulations, and the EAB erred as a matter of law when it affirmed DNREC's review and issuance of the 2017 Permit.

Neither Artesian's nor DNREC's arguments undermine this logic.

A. Appellants' Position Does Not Require A New HSR and SWAR Every Time A Change Is Made.

Artesian starts with the misleading claim that Appellants' interpretation of the 2014 Regulations requires a "re-do" or a "complete do-over" of site characterization work—that is, preparing an HSR and SWAR—every time there is any change in

facility design. Artesian Br. 25-26.[9] As Appellants explained in their Opening Brief, this overblown claim is simply not true. While Appellants fully rebut the underlying legal issues later in this brief, it is important to dispel this misconception up front.

Section 6.3.1.14.1 of the 2014 Regulations requires a permittee with an unexpired construction permit wanting to make "changes" submit a permit application to DNREC. Section 6.5 then expressly requires there be an approved HSR and SWAR before DNREC considers a permit application. This requirement exists because the Regulations' seek to improve site selection to what DNREC in 2014 determined was the minimum level necessary to minimize environmental impacts from LOWTDS. For an § 6.3.1.14.1 applicant who originally obtained its construction permit under the 2014 Regulations, an approved HSR and SWAR would already exist at the time § 6.3.1.14.1 was triggered; no new HSR or SWAR would be required. For a § 6.3.1.14.1 applicant like Artesian who originally obtained a permit prior to the 2014 Regulations, all § 6.5 requires is that there be an approved HSR and SWAR; if they do not exist at the time of § 6.3.1.14.1 application, they must be submitted because § 6.5 otherwise prohibits DNREC from even considering the application until approved HSR and SWAR documents exist. However—just like post-2014 permittees—once the HSR and SWAR are submitted and approved,

[9] DNREC also makes a "do over" point in its retroactivity argument. DNREC Br. 23.

they can satisfy § 6.5. In short, § 6.5 only requires *one* approved HSR and SWAR; general "site characterization data" would not satisfy the express language of § 6.5. Appellants contend that Artesian must do an HSR and SWAR one time to satisfy § 6.5. But it is simply wrong to say that HSRs and SWARs must be submitted again and again.

Artesian complains this is "harsh" and "unfair," Artesian Br. 27, but Artesian chose to engage in seeking a different DNREC authorization in 2017. The 2013 Permit did not authorize Artesian's 2017 version of ANSRWRF Phase I. By proceeding under § 6.3.1.14.1 to seek DNREC's written approval, it subjected that request to the regulations in effect in 2017—i.e., the 2014 Regulations. Nothing (except for DNREC's and Artesian's tortured interpretations) allow for an exception to, or different treatment under, those Regulations. Artesian is not entitled to the benefits of the 2017 Permit without also bearing the responsibility of complying with the Regulations applicable to relevant permitting actions.

B. The 2014 Regulations Do Not Allow "Amendments" of Artesian's 2013 Construction Permit But Instead Require A Permit Application.

The 2017 permitting occurred under § 6.3.1.14.1 of the 2014 Regulations. Both Artesian and DNREC claim that the 2017 Permit is merely an "amendment" of Artesian's 2013 Permit, and § 6.3.1.14.1 treats "amendments" differently than "new permit applications." The plain language of the section rebuts those arguments.

Section 6.3.1.14.1 states:

> 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.

§ 6.3.1.14.1. Both Artesian and DNREC claim this provision creates a two-path permitting system based on the size or significance of the modifications proposed: (1) if the modifications are significant (in DNREC's words, "rise to the level of 'changes,'" DNREC Br. 21), then a "new permit application" must be submitted; but (2) if the modifications are not significant (do not rise to the level of "changes"), then a permit amendment is appropriate. DNREC Br. 21; Artesian Br. 28-29. Both claim path #2 applies in this case. There are at least two problems with this interpretation.

First, § 6.3.1.14.1 does not contain the language that Artesian and DNREC graft onto it. It does not speak in terms of "new" permit applications or applications to "amend"—it simply speaks of a "construction permit application." Appellants' Opening Brief (p. 33 and n. 15) lists the numerous places that the word "new" appears elsewhere in the 2014 Regulations.[10] Section 6.3.1.14.1's failure say anything about "amending" a *construction* permit contrasts with § 6.5.3.3.1's

[10] Artesian points out that these citations discuss systems or facilities, not permits, Artesian Br. 37, but that is a distinction without a difference. Appellants point is that the Regulations' drafters knew how to place focus only on "new" and "existing" objects of regulation by actually using those terms. No use of "new" in § 6.3.1.14.1 means it is not limited to "new" permit applications.

express recognition of amending *operating* permits. (A. 717). When a provision appears in one part of a statute or regulation but not in another, one presumes the omission was intended. *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982).[11]

Second, nothing in § 6.3.1.14.1 creates any measurement or different permitting paths based on the significance of the "changes" proposed. As written, the occurrence of "changes" triggers the requirement to submit the permit application, plans and specifications, engineer report, and fees. If no "changes" occur, then none of the requirements apply. In other words, "changes" play a binary role: turning on the requirements if "changes" have occurred or requiring nothing if "changes" have not occurred.[12] Nothing in § 6.3.1.14.1 states or implies a spectrum of "changes" which result in different permitting processes depending on their significance.[13]

Instead, what § 6.3.1.14.1 expressly provides is that a construction permit holder like Artesian will submit a "construction permit application, plans and specifications, and design engineer report" if "changes have occurred." That is

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[11] DNREC cites a § 6.3.3.13 in support of its interpretation, DNREC Br. 18, but **no such section exists in the 2014 Regulations.** *See* A. 705 (going from § 6.3.2.3.14.3.6 to § 6.4). Even if it exists somewhere else in the Regulations, the wording DNREC recites does not create or even suggest the two-path permitting system DNREC reads into § 6.3.1.14.1.

[12] Thus, DNREC's "rise to the level of changes" interpretation does not comport with the language of § 6.3.1.14.1.

[13] Thus, neither Appellee's discussion of the relative significance of the 2017 changes (DNREC Br. 18, 21; Artesian Br. 39-42) is relevant.

exactly what Artesian did. (A. 1-2). Having submitted the required construction permit application in 2017, the question becomes what the 2014 Regulations required DNREC do with that application.

Artesian's citation to the lack of express reference to HSRs or SWARs in § 6.3.1.14.1, Artesian Br. 28-29, 36 n. 40, is of no consequence. Regulations must be to read to produce a harmonious whole. *Garrison*, 3 A.3d at 267. Section 6.3.1.14.1 mandates that a permit application be submitted. There is no need for it to specify an HSR or SWAR (which may already exist); rather, it is § 6.5—describing how DNREC must process a permit application (by not reviewing it until there is an approved HSR and SWAR)—that creates the requirement for an HSR and SWAR to be on the permit reviewer's desk.

C. Section 6.5 Requires An Approved HSR And SWAR Before DNREC Can Review A Permit Application.

Appellants read § 6.5 of the 2014 Regulations as it is written:

> Large System Permitting.
>
> In order to obtain a permit to construct and operate an on-site wastewater treatment and disposal system with daily flow rates of > 2,500 gallons, 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*.

§ 6.5 (A. 709) (emphasis added). By its "clear language," § 6.5 prohibits DNREC from reviewing a "permit application" for a LOWTDS until an HSR and SWAR

have been reviewed and approved by DNREC. Appellants position here is simple: § 6.3.1.14.1 required submission of—and Artesian did submit—a "permit application" because (as Artesian's and DNREC's actions admit) "changes ha[d] occurred" in ANSRWRF's Phase I design. Thus, when DNREC reviewed and approved Artesian's "permit application" without an approved HSR and SWAR from Artesian (as none had been performed, submitted, or approved), it acted contrary to the law specified in § 6.5. By affirming the Secretary's Order and issuance of the 2017 Permit despite this failure to comply with § 6.5, the EAB also acted contrary to law.

Artesian focuses on the "obtain a permit" language to argue that § 6.5 only applies to "new" permits. Artesian Br. 30-31. Of course, § 6.5 doesn't actually say "new" permits, so Artesian falls back on its unsupported notion that § 6.3.1.14.1 allows "amended" permits to justify its attempt to narrow the section. In fact, Artesian's view does not withstand scrutiny.

First, as noted, the very language of § 6.5 applies no "new" limitation to the permit applications falling within its purview. Artesian cannot simply add convenient terms to clear regulatory language.

Second, Artesian's notion that "obtaining" a permit means it only applies to initial permits, Artesian Br. 31, fares no better. Other than a weak footnote, *id*. n.

36,[14] Artesian fails to explain how its view comports with the 2014 Regulations' definition of permit: "'**Permit**'" means the written document approved by the Department which authorizes the installation of a system or any part thereof, which may also require operation and maintenance of the system." § 2.0 (A. 629). Thus, every time an applicant needs DNREC's authorization to construct (or install) a LOWTDS, it must get a "permit" allowing it to do so.[15]

That is what happened here. The 2013 Permit authorized Artesian to build a treatment plant for domestic wastewater from the homes of Elizabethtown. It did *not* authorize handling industrial, food-processing wastewater from Allen Harim, with treatment by Allen Harim and not Artesian, at 50-100% higher volumes. If it did, then Artesian did not have to apply for, and DNREC did not have to issue, the 2017 Permit. Once Artesian made "changes" to its 2013 version of ANSRWRF's Phase I triggering § 6.3.1.14.1, it needed to obtain DNREC's approval to construct a system different from that approved in the 2013 Permit.[16] In the language of the 2014 Regulations, Artesian had to "obtain a permit" (i.e., a written document from

[14] Artesian's dismissal of the definition of permit relies upon its mistaken notion that § 6.3.1.14.1 allows "amended" permits. DNREC does not even mention—much less confront—the definition of "permit."

[15] This obviates the need for construction permit "amendments"—the permittee gets a "permit" instead. In turn, this supports Appellants' interpretation that § 6.3.1.14.1 does not authorize construction "amendments;" they are unnecessary under these terms.

[16] The differences can be seen by comparing the General Description paragraphs in the 2013 (A. 590) and 2017 (A. 606) Permits.

DNREC authorizing it) "to install" (i.e., construct) its 2017 version of ANSRWRF Phase I. Indeed, Artesian submitted a *permit* application[17] for (A. 1), and DNREC issued, a "Spray Irrigation Construction *Permit*" (A. 604) (emphasis supplied). Interpreting the 2014 Regulations by giving meaning to all its terms, Artesian submitted a permit application to "obtain a permit;" thus, § 6.5 applies with full force to Artesian's 2017 application.[18]

Third, § 6.5 specifically requires an approved HSR and SWAR before DNREC considers the permit application. It does not say that "site characterization" data is good enough. As Appellants pointed out, Opening Br. 34-35, and neither DNREC nor Artesian confront, the Foreword to the 2014 Regulations specifically said the pre-2014 regulations were not good enough, and proper site characterization is now spelled out in the 2014 Regulations. (A. 622).[19] Therefore, that Artesian had

[17] DNREC's assertion that Appellants are making "permit application" a "term of art," DNREC Br. 33-34, makes little sense. While not defining "permit application" itself, the 2014 Regulations do define "permit" (see above) and "applicant" as someone "who has submitted an application to the Department for review and approval." § 2.0. Applying the rule of construction giving terms their ordinary, common meaning, *Garrison*, 3 A.3d at 267, a "permit application" is nothing more than an application to obtain a permit under the 2014 Regulations.

[18] Because § 6.1 uses the same "obtain a permit" language, it is subject to the same analysis here, and Artesian's citation to it and Superior Court's use of § 6.1, Artesian Br. 31, does not rebut the conclusion.

[19] Artesian's claim that Appellants' interpretation hinders the "Department policy" behind the Regulations, Artesian Br. 37-38, rests on the faulty claim (disproven above) that minimal changes like moving a pipe ten feet triggers a "do-over" of all site characterization. Section 6.2 requires one HSR and SWAR within that "policy;"

pre-2014 site characterization data does not satisfy the clear, express language of § 6.5 or the purposes behind the 2014 Regulations. This also forecloses DNREC's backup defense that the 2013 Permit data provided all the information that an HSR and SWAR would provide.[20]

Fourth, Artesian's claim that Appellants' interpretation of § 6.5 is unharmonious because "then there is no reason for § 6.3.1.14.1 to exist," Artesian Br. 35, fails for its faulty logic. It rests on the mistaken notion that both sections require HSRs and SWARs; however, § 6.3.1.14.1 does not—only § 6.5 does. More generally, there is no conflict created by § 6.5 and another section using similar terms. Section 6.5 states a general rule: one must submit a permit application to obtain a permit; other sections (like § 6.3.1.14.1) spell out in more detail what must be submitted. Section 6.3.1.15.1 (A. 697), for example, requires a "construction permit application" to start the next phase of an existing project. In Artesian's erroneous two-path view of permitting, ANSRWRF Artesian Phases II and III would require a "new" permit application because the 2013 and 2017 Permits only allow

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because Appellants' position requires the same, it imposes no additional burden on that "policy."

[20] Although the Board prevented Appellants from presenting a full rebuttal, the record already shows the shakiness of this defense. DNREC witness Jack Hayes admitted that Artesian's 2013 site characterization data on the number of soil borings (13 over 1652 acres) did not meet HSR requirement of one every 10 acres, *see* 3/12/19 Tr. at 63-65 (A. 411-413), and the 2014 regulatory requirement for demonstrating applicable performance standards for nitrogen in each field was met for only one of the four fields being permitted. *Id*. at 67-70 (A. 415-418).

Phase I. Yet under Artesian's misguided logic, § 6.5's use of the term "permit application" renders § 6.3.1.15.1 meaningless. That is wrong. These sections produce harmony by complementing, not negating, each other.

Both DNREC and Artesian cite § 6.5.2.2.2, DNREC Br. 32-33, Artesian Br. 36, but that does not change the conclusion here. Section 6.5.2.2.2 states:

> 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 a new or updated Design Engineer Report and construction plans as outlined in Sections 6.2.3, 6.5.1.4 and 6.5.1.5 for project re-evaluation.

§ 6.5.2.2.2 (A. 713). Both misread the citation of § 6.2.3 (the section spelling out HSR requirements) as requiring an HSR be performed.[21] However, § 6.5.2.2.2 does not mandate a new HSR—only "construction plans as outlined" in § 6.2.3 and 2 other sections. The language therefore seeks only whatever § 6.2.3 requires be in construction plans. For example, § 6.2.3.3.3 contains a requirement for the specific situation in § 6.5.2.2.2: "If construction has not been initiated prior to the expiration of the construction permit, a new well survey [of all wells within 1000 feet] must be submitted for a permit extension or renewal." (A. 692). Given that this requirement is not found in §§ 6.5.1.4 and 6.5.1.5, it appears that the reference to § 6.2.3 ensures

[21] DNREC's argument about "moving into the next phase where the next phase has not been permitted," DNREC Br. 33, is misplaced. Artesian wasn't "moving into the next phase" of anything. The 2013 Permit allowed it to construct Phase I only (*see* 2013 Permit at 6 (A.593), while the 2017 Permit allows it to construct a different Phase I only (*see* 2017 Permit at 3 (A. 606) and 8 (A. 611)).

this well survey gets done. Further, as both DNREC and Artesian admit, § 6.5.2.2.2 does not apply to Artesian, whose 2013 Permit was not expired in 2017. In short, § 6.5.2.2.2 does not alter the conclusion that § 6.5 required an HSR and SWAR before DNREC considered Artesian's 2017 application.

D. The 2014 Regulations Makes Site Characterization Important Throughout The Permitting Process.

Both DNREC and Artesian make the legally incorrect claim that site characterization like HSRs and SWARs are initial or "threshold analysis" done only at the beginning of the permitting process. DNREC Br. 30-31, 34-35; Artesian Br. 24-26. The 2014 Regulations directly contradict this.

Section 6.3.1.3 (A. 696) requires that "[p]ermit applications must demonstrate the system is designed in accordance with the prescribed system type and design considerations as specified in the approved SIR, HSR, and SWAR for that parcel."[22] That puts HSRs and SWARs squarely in the design phase of the permitting process. Section 6.5's expressly prohibition against application review without an approved HSR and SWAR puts these documents in the permit application review stage. After a facility is operating, § 6.5.4 (A. 717) requires a Compliance Monitoring Report (CMR) for renewing the operating permit. Section § 6.5.4.3.2 (A. 718) mandates a

[22] Appellants note that this language is specific to approved HSRs and SWARs—not site characterization data in general. Without having an approved HSR and SWAR, it is impossible to comply with this section.

"Hydrogeologic Suitability Report" (an HSR), with many of the same types of data as the HSR in § 6.2.3,[23] be part of a CMR. Given § 6.5.4.3.2, DNREC's claim that Appellants are advancing an "untenable position" because an HSR would be required for "an existing facility seeking a renewed operating permit," DNREC Br. 34, seems especially off the mark—it ***is*** required. In short, the 2014 Regulations refute the notion that HSRs and SWARs are one-and-done threshold components. Even if they were, § 6.3.1.3 and § 6.5 require an actual HSR and SWAR—and there is none here.

E. DNREC Is Not Entitled To Deference.

Both DNREC and Artesian claim DNREC's interpretations of the 2014 Regulations are entitled to deference. DNREC Br. 16, 19-20, 22, 26, 35-36; Artesian Br. 32-35. DNREC does not have unfettered discretion to adopt interpretations or rewrite the Regulations to suit its whims; "[d]eference to an administrative agency's interpretation of its regulations cannot go so far as to authorize a regulation other than the one that was duly adopted." *Garrison v. Red Clay Consol. School Dist.*, 3 A.3d 264, 269 (Del. 2010).[24] The case DNREC cites for its "clearly wrong"

[23] *Compare e.g.,* requirements *re* on- and off-site well location data (§§ 6.5.4.3.2.1.2 and 6.5.4.3.2.1.3 (A. 718) to 6.2.3.3 (A. 692)); water table information (§§ 6.5.4.3.2.1.5 and 6.5.4.3.2.1.7 (A. 718) to 6.2.3.4.1 (A. 692)); groundwater flow (§§ 6.5.4.3.2.1.7 to 6.2.3.4.3 (A. 693)); and groundwater quality (§§ 6.5.4.3.2.1.9 (A. 718) to 6.2.3.5 (A. 694-94)).

[24] Artesian's attempt to distinguish *Garrison*, Artesian Br. at 33, fails. *Garrison* does not require irreconcilable regulations; rather, it stands for the general

standard, DNREC Br. 26—*Div. of Soc. Servs. of Dep't of Health & Soc. Servs. v. Burns*, 438 A.2d 1227 (Del. 1981)—holds that standard is met, and reversal is required, when "the rights created or benefits conferred by an agency's construction of its rules are contrary to their plain meaning." *Id*. at 1229. Here, DNREC's creation of a separate "amendment" permitting path not found in the plain meaning of § 6.3.1.14.1, its failure to require the HSR and SWAR before considering Artesian's permit application despite the plain meaning of § 6.5, its insistence on the application of pre-2014 Regulations despite the plain meaning of § 1.3, have conferred on Artesian the benefit of receiving the 2017 Permit without compliance with the 2014 Regulations. This is not, at Artesian claims, a dispute between two reasonable interpretations, Artesian Br. 34; DNREC's (and Artesian's) interpretations are unreasonable given the actual language of the Regulations. DNREC is "clearly wrong" on the law; its interpretations are therefore not entitled to deference.

Further, Delaware law holds that "once an agency adopts regulations governing how it handles its procedures, the agency must follow them. If the agency does not, then the action taken by the agency is invalid." *Hanson v. Delaware State*

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proposition cited here: an agency cannot stray from the regulations duly adopted. If irreconcilable positions are needed, DNREC provides plenty—its "do apply/do not apply" position; the conflict between actual language of the regulations and DNREC improper additions to them; and the conflict between the definition of permit and DNREC's interpretation of § 6.3.1.14.1 and § 6.5.

Public Integrity Com'n, 2012 WL 3860732 (Super. Ct. Aug. 30, 2012), *citing Dugan v. Delaware Harness Racing Commission,* 752 A.2d 529 (Del.2000); *Mumford & Miller Concrete, Inc. v. Dept of Labor*, 2011 WL 2083940 at *6 (Super. Ct. April 19, 2011) (same). The 2014 Regulations prohibit DNREC from considering a permit application until there is an approved HSR and SWAR; DNREC must follow it. Here, DNREC did not, so its approval of the 2017 Permit was "invalid." The EAB's affirmance of such legally infirm actions is also clear legal error and should be reversed.

F. To The Extent Questions Of Fact Still Exist, Remand Is Appropriate

The legal question concerning interpretation of the relevant regulations justifies remand. However, DNREC makes a factual assertion: "in an abundance of caution, DNREC reviewed the approved [2007] Site Selection and Evaluation Report and additional information submitted with [Artesian's] Application and determined it had all the data necessary to satisfy the analysis required by Section 6.2." DNREC Br. 36. This was the focus of Mr. Grobbel's[25] testimony when the

[25] Artesian's arguments to limit Mr. Grobbel's testimony (Artesian Br. 42-47) are wrong. Artesian admits the Board cut off Mr. Grobbel on the grounds that, if an HSR is not required, analysis of data from the 2013 Permit is irrelevant. The Board, however, never ruled on testimony about DNREC's claim that the 2013 data satisfies § 6.2 if an HSR is required. Appellants are entitled to attack that claim. Nor is Mr. Grobbel using evidence "not before the Secretary;" if DNREC (as it claims) did compare the 2013 Permit data to the requirements of § 6.2, then that data **was** before the Secretary, and Appellants can present testimony about that very data to rebut DNREC's claim.

Board cut him off in the middle Appellants' case-in-chief. To the extent DNREC wants to claim it satisfied § 6.2's site characterization requirements with pre-2014 data, it is fundamentally unfair to prevent Appellants from presenting their full case. Remand is therefore appropriate if this issue still exists.

CONCLUSION

For the reasons set forth above, Appellants respectfully request that this Court reverse the June 10, 2019 Decision and Final Order of the Environmental Appeals Board and either: (1) remand the matter back to the Board for further proceedings to determine whether issuance of the 2017 Permit complied with the 2014 Regulations; or (2) reverse the EAB Order and Secretary's Order and require submission and consideration of the required HSR and SWAR before issuance of a construction permit to Artesian.

Respectfully submitted,

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CERTIFICATE OF TYPEFACE AND WORD COUNT COMPLIANCE

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Time New Roman 14-point typeface using Microsoft Word Office 365.

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