EFiled: Aug 25 2020 10:54PM EDT
Filing ID 65876421
Case Number Multi-Case

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DELAWARE SOLID WASTE AUTHORITY; GREGGO & FERRARA, INC.; and CONTRACTORS HAULING, LLC,	)	Nos. 81,2020 and 88,2020 Consolidated
Appellees Below, Appellants/Cross-Appellees,	)	
v.	)	Court Below – Superior Court of the State Delaware
DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL,	)	C.A. No. K19A-05-002
Appellant Below, Appellee/Cross-Appellant.	)	

APPELLEE/CROSS-APPELLANT, DELAWARE DEPARTMENT OF NATURAL RESOURCES & ENVIRONMENTAL CONTROL'S CORRECTED CONSOLIDATED ANSWERING BRIEF ON APPEAL & CONSOLIDATED OPENING BRIEF ON CROSS-APPEAL

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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NATURE AND STAGE OF THE PROCEEDINGS

On or about November 28, 2018, Appellee/Cross-Appellant, the Delaware Department of Natural Resources & Environmental Control ("Department" or "DNREC") issued a Secretary's Order pursuant to 7 *Del. C.* § 6005(b)(3) to each Appellant/Cross-Appellee as follows:

- Secretary's Order No. 2018-WH-0066 to Appellant/Cross-Appellee, Delaware Solid Waste Authority ("DSWA"). (B00001).
- Secretary's Order No. 2018-WH-0067 to Appellee, Greggo & Ferrara, Inc. ("G&F"). (B00109).
- Secretary's Order No. 2018-WH-0068 to Appellee, Contractors Hauling, LLC ("Contractors" or "CH"). (B00117).

Each Secretary's Order arose from Contractors' transportation of solid waste without a permit from DSWA's Pine Trees Corner Transfer Station ("PTCTS") to DSWA's Central Solid Waste Management Center landfill ("CSWMC"), in violation of 7 *Del. C.* § 6003 and Delaware's *Regulations Governing Solid Waste* (the "*Regulations*").[1]

On December 19, 2018, pursuant to 7 *Del. C.* § 6008, DSWA, G&F, and Contractors each filed a "Statement of Appeal" with the Delaware Environmental Appeals Board ("EAB" or "Board") challenging its respective Secretary's Order.

[1] 7 *Del. Admin. C.* § 1301.

The Board subsequently docketed DSWA's Appeal as Appeal No. 2018-08, G&F's Appeal as Appeal No. 2018-09, and Contractors' Appeal as Appeal No. 2018-10.[2] Appellants/Cross-Appellees' Statements of Appeal before the EAB overlapped in several respects, as each challenged the penalty and costs assessed, and asserted that their respective Orders were unreasonable where no environmental harm occurred.

On February 12, 2019, the Board held a consolidated evidentiary hearing on Appellants/Cross-Appellees' respective appeals, and on May 13, 2019, the Board published its written decision to the parties.[3] As an initial matter, the Board held that it had jurisdiction to review and set aside the Department's costs recovery in a DNREC enforcement action.[4] With respect to DSWA, the Board fully reversed Secretary's Order 2018-WH-0066, finding, among other things, that the condition in DSWA's PTCTS Permit requiring DSWA to "investigate and assure the existence and validity of DNREC transporter permits is unlawful."[5]

With respect to G&F and Contractors, the Board affirmed the Department's findings in Secretary's Orders 2018-WH-0067 and 2018-WH-0068 that G&F and Contractors violated Delaware's environmental laws based on Contractors'

[2] DSWA's Statement of Appeal (B00125). G&F's Statement of Appeal (B00130). Contractors' Statement of Appeal (B00134).
[3] The Board's May 13, 2020 Opinion (B00138).
[4] (B00149-150).
[5] (B00149).

unpermitted transport of solid waste.[6] However, the Board ultimately remanded Secretary's Orders 2018-WH-0067 and 2018-WH-0068 with instructions that the Secretary rescind the penalty (and costs) assessed against G&F and Contractors, because it concluded that the violations were attributable to "understandable oversight" and "an innocent lack of communication."[7]

On May 14, 2019, the Department filed its Notice of Appeal with the Superior Court pursuant to 7 *Del. C.* § 6009 and Superior Court Rule of Civil Procedure 72. After briefing, the Superior Court issued its January 29, 2020 Memorandum Opinion and Order in which it affirmed in part, reversed in part, and remanded to the EAB for further proceedings on the DSWA Order, the G&F Order, and the CH Order.[8]

Following the Superior Court's decision, each party applied for certification of an interlocutory appeal pursuant to Supreme Court Rule 42. In a February 25, 2020 Order, the Superior Court granted the parties' applications for certification.[9] This Court accepted and consolidated the parties' interlocutory appeals by Order dated March 18, 2020.[10]

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[6] (B00150-151).
[7] (B00149-151).
[8] *See Delaware Dep't of Nat. Res. & Envtl. Control v. Delaware Solid Waste Auth.*, 2020 WL 495210, at *5 (Del. Super. Ct. Jan. 29, 2020). (Attached as Exhibit A to DSWA's Opening Brief).
[9] A copy of the February 25, 2020 Order is attached as Exhibit B to DSWA's Opening Brief.
[10] A copy of this Court's March 18, 2020 Order is attached as Exhibit C to DSWA's Opening Brief.

This is the Appellee/Cross-Appellant's Combined Answering Brief on Appeal and Opening Brief on Cross-Appeal.

SUMMARY OF THE ARGUMENTS

(A) DNREC's Responses to G&F and CH's Summary of the Arguments:

1. **Denied**. Section 6008(b) of Title 7 limits the Board's review of a case decision to whether the evidence before the Board supports the Secretary's decision. Furthermore, the Department maintains that this is the appropriate standard of review whether the Board holds the initial adversarial hearing or whether the Board is hearing the appeal following a hearing before the Secretary. Thus, the Department contends that the Board erred as a matter of law in substituting its judgment for that the Secretary's where the evidence of record before the Board supported the Secretary's decisions. This issue is addressed in Section I. of the Department's Argument.

2. **Denied**. The Superior Court correctly held that the Board erred in rescinding the administrative penalties imposed by the Secretary for G&F and CH's respective violations. This issue is addressed in Section II. of the Department's Argument.

3. **Denied as Stated.** The Department **Admits**, as it did before the Superior Court and the Board, that its authority to recover costs under 7 *Del. C.* § 6005(c) is conditioned on the Department first submitting "a detailed billing of expenses to the liable person," and that it has not yet submitted the required detailed billing to DSWA, G&F, or CH. Therefore, the Department does not challenge the Superior

Court holding that "the Secretary's cost recovery decisions were not properly before the Board on appeal, and the Board did not have authority to review them." The Department, however, **Denies** G&F and CH's broader assertion that the Department cannot recover costs in this case, as nothing in the Superior Court's decision nor § 6005(c) suggests that the Department is now precluded from submitting the necessary detailed billing. This issue is addressed in Section III. of the Department's Argument.

(B) <u>DNREC's Responses to DSWA's Summary of the Arguments</u>:

1. **Denied**. The Superior Court, relying on this Court's decision in *Formosa Plastics Corp. v. Wilson*, 504 A.2d 1083, 1089 (Del. 1986), correctly held that DNREC has the authority to include reasonable conditions in permits, and that 7 *Del. C.* § 6003(c) does not require that all permit conditions must have "explicit regulatory antecedents" as DSWA contends. Contrary to DSWA's assertions, Condition II.I.2's requirements have both express and implied bases in duly promulgated regulations, as Delaware's *Regulations Governing Solid Waste* and 7 *Del. C.* § 6003 require that anyone transporting solid waste have a permit issued by the Department. Therefore, this Court should affirm the Superior Court's holding that the Board erred as a matter of law in concluding that DNREC lacked the authority to include Condition II.I.2 in DSWA's PTCTS Permit. This issue is addressed in Section IV. of the Department's Argument.

2. **Denied**. The Superior Court erred in holding that Condition II.I.2, as drafted, is unconstitutionally vague. Contrary to DSWA's assertion, the Department maintains that Condition II.I.2 provides a person of ordinary intelligence, particularly a person engaged in the heavily regulated activities of collecting, transporting, storing, processing and disposing of solid wastes, fair notice of what Condition II.I.2 requires. Therefore, the Department respectfully requests that this Court reverse the Superior Court's holding that Condition II.I.2 is unconstitutionally vague. This issue is addressed in Section V. of the Department's Argument.

3. **Denied**. Condition II.I.2 is not an unconstitutional subdelegation of executive power in violation of the Delaware Constitution and 7 *Del. C.* § 6005(a). Nothing in Condition II.I.2 imposes an obligation on DSWA to "police an unaffiliated third-party's regulatory compliance;" rather, it ensures that DSWA's waste transfer activities at its PTCTS are conducted in compliance with the statutory and regulatory requirements applicable to the transportation of solid waste, including that the vehicles used to transport the waste have a valid solid waste transporters permit. Therefore, this Court should reject DSWA's unconstitutional subdelegation argument. This issues is addressed in Section VI. of the Department's Argument.

4. **Denied**. The Superior Court correctly held that DSWA's lack of knowledge of CH is no defense for its failure to list CH on its annual reports under 7 *Del. C.* §

6005(b)'s strict liability standard for determining permit violations. This issue is addressed in Section VII. of the Department's Argument.

(C) <u>Summary of DNREC's Arguments on Cross-Appeal</u>:

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

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

reviewing whether the penalty imposed is consistent with § 6005(b)(3). This issue is addressed in Section II. of the Department's Argument.

3. The Superior Court correctly held that "the Secretary's cost recovery decisions were not properly before the Board on appeal, and the Board did not have authority to review them." The Department, however, maintains that it may still recover its costs in this matter upon submission of a detailed billing to G&F, CH, and DSWA, and that review of the Department's cost recovery is to be in accordance with the process stated in 7 *Del. C.* § 6005(c). This issue is addressed in Section III. of the Department's Argument.

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

5. Condition II.I.2 is not unconstitutionally vague, as found by the Superior Court. Condition II.I.2 places four clear obligations on DSWA that derive directly from the statutory and regulatory requirements that solid waste may only be

transported by someone holding a valid solid waste transporters permit. Furthermore, the Department maintains that a person of ordinary intelligence engaged in the heavily regulated activities of collecting, storing, and transporting solid waste can understand what Condition II.I.2 requires. Therefore, the Superior Court erred in holding that Condition II.I.2 is unconstitutionally vague. This issue is addressed in Section V. of the Department's Argument.

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

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

STATEMENT OF FACTS

A. Solid Waste Transporter Requirements:

Under 7 *Del. C.* § 6003, a person must first obtain a permit before transporting solid waste.[11] Delaware's *Regulations Governing Solid Waste* further specify requirements for solid waste transporters.[12] Among these requirements are the following:

- § 1301-7.1.5 "Each vehicle used to transport solid waste and required to have a transporter's permit must carry a copy of the permit in the vehicle. The permit must be presented upon request to any law enforcement officer or any representative of the Department."
- § 1301-7.2.3.5 "The transporter's name shall be prominently displayed on both sides of the vehicle in figures at least three inches high and of a color that contrasts with the color of the vehicle."
- § 1301-7.2.3.6 "The transporter's permit number shall be prominently displayed on both sides and the rear of the vehicle in figures at least three inches high and of a color that contrasts with the color of the vehicle."

[11] 7 *Del. C.* § 6003(a)(4); 7 *Del. Admin. C.* § 1301-7.1.1.
[12] 7 *Del. Admin. C.* § 1301-7.

B. G&F's and Contractors' Violations:

On July 6, 2017, DSWA awarded a contract for the operation and maintenance of its PTCTS to G&F, under which G&F was responsible for transporting waste from PTCTS to DSWA's CSWMC landfill.[13] G&F commenced operating PTCTS on or about September 1, 2017.[14]

Contractors and G&F, while affiliated, are separate entities.[15] Beginning in September 2017, G&F utilized Contractors to transport the waste from PTCTS to CSWMC.[16]

On July 25, 2018, DNREC Natural Resources Police Officer Austin Tyler stopped a tractor-trailer type vehicle hauling waste leaving PTCTS with Contractors' logo on the vehicle's sides.[17] Officer Austin stopped the vehicle because there were no solid waste transporter permit numbers on the vehicle, as 7 *Del. Admin. C.* §

[13] DSWA's Statement of the Case (B00160); G&F's Statement of the Case (B00165); DSWA Contract with G&F (B00175).
[14] (B00160; B00166).
[15] (B00132) ("The ownership of Greggo & Ferrara, Inc. and Contractors Hauling, LLC, whether individuals or other entities, are all within the Greggo & Ferrara group."); (B00136).
[16] Contractors Statement of the Case (B00171). ("Since Contractors Hauling performs the hauling activities for G&F related companies, G&F did not focus on any need for a separate [transporters] permit for [Contractors]."). *See also* (B00166).
[17] Officer Austin's Police Report (B00539); Transcript of Hearing Testimony at pg. 96, line 17 – pg. 100, line 9 (B00297-301).

1301-7.2.3.6 requires.[18] The truck driver was unable to provide Officer Tyler a copy of a waste-hauler's permit.[19]

The evidence of record shows, and witnesses on behalf of G&F and CH conceded, that the CH's vehicles were not covered on a solid waste transporter permit during the period of September 2017 through July 2018.[20] Additionally, neither G&F nor CH ever contacted the Department prior to June 2018 to inquire into whether the CH's vehicles needed permit coverage, nor did G&F ever attempt to amend its solid waste transporter permit to add the CH vehicles.[21]

With respects to G&F, the Department found that G&F violated 7 *Del. Admin. C.* § 1301-7.1.7, which provides: "Permitted solid waste transporters shall not use agents or subcontractors who do not hold permits for transporting solid waste."[22] The Board affirmed the Department's finding that G&F violated 7 *Del. Admin. C.* § 1301-7.1.7, writing, "the Board concludes as a matter of law that G&F used an agent or subcontractor [Contractors] who did not hold a permit to transport solid waste."[23]

With respects to Contractors, the Department found that Contractors violated 7 *Del. C.* § 6003(a)(4) and 7 *Del. Admin. C.* § 1301-7.1.1.[24]

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[18] (B00539); Hearing Transcript at pg. 97, line 14 – pg. 98, line 15 (B00298-299).
[19] (B00539); Hearing Transcript at pg. 98, line 16 – pg. 99, line 5 (B00299-300).
[20] Hearing Transcript at pg. 179, line 6 – pg. 180, line 21 (B00380-381).
[21] Hearing Transcript at pg. 170, line 1 – pg. 171, line 9 (B00371-372).
[22] (B00111-112).
[23] (B00150).
[24] (B00120).

Section 6003(a)(4) provides:

> (a)No person shall, without first having obtained a permit from the Secretary, undertake any activity: . . . (4) In a way which may cause or contribute to the collection, transportation, storage, processing or disposal of solid wastes, regardless of the geographic origin or source of such solid wastes . . . .

Similarly, 7 *Del. Admin. C.* § 1301-7.1.1 provides: "No person shall transport solid waste, without first having obtained a permit from the Department. . . ."

The Board affirmed the Department's finding that Contractors violated 7 *Del. C.* § 6003(a)(4), but did not expressly address whether Contractors also violated 7 *Del. Admin. C.* § 1301-7.1.1. The Board wrote:

> The Board finds as a matter of fact that [Contractors] did not possess a transporter permit from September 2017 through July 2018 when it transported waste from PTCTS to CSWMC on behalf of G&F. Thus the Board concludes as a matter of law that [Contractors] transported solid waste without a permit in violation of 7 *Del. C.* § 6003.[25]

While the Board affirmed the Secretary's determinations that G&F and Contractors committed the violations cited in their respective Secretary's Orders, the Board went on to remand the Secretary's Orders with instructions that the Secretary rescind the penalties assessed against G&F and Contractors. The Board based its decision to rescind the penalties on its conclusion that G&F's and

[25] (B00150-151).

Contractors' violations were the result of innocent mistake and understandable oversight.[26]

C. DSWA's Violations:

As documented by the Board's affirmance of the Secretary's findings as to G&F's and Contractors' violations discussed above, the evidence of record demonstrates that unpermitted vehicles were used to transport solid waste from DSWA's PTCTS to its CSWMC landfill from September 2017 through July 2018. The record also shows that DSWA became aware that G&F was using Contractors to transport waste and that Contractors' vehicles were not covered by a solid waste transporter permit on or about June 14, 2018.[27] Furthermore, the record shows that DSWA never informed the Department that Contractors was the entity transporting waste, nor did DSWA ensure that G&F ceased using unpermitted vehicles to transport waste after learning that G&F was using Contractors in June 2018.[28] Additionally, DSWA failed to identify Contractors on its annual reports for PTCTS and CSWMC, as its permits require.[29]

Based on the foregoing, the Department concluded that DSWA violated condition II.I.2 of its PTCTS Permit, which states in part, "All vehicles

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[26] (B00150-151).
[27] Hearing Transcript at pg. 77, lines 3 – 6 (B00278).
[28] Hearing Transcript at pg. 75, line 15 – pg. 81, line 7 (B00276-282).
[29] (B00006-00007); 2017 Annual Report for PTCTS and Hauler List from 2017 CSWMC Annual Report (B00469).

transporting waste from the Transfer Station shall have a valid solid waste transporters permit issued by the DNREC."[30] Additionally, because DSWA did not list Contractors as a transporter of waste on its annual reports for PTCTS and CSWMC, the Department concluded that DSWA violated the conditions of its permits requiring it to list all waste transporters on its annual reports.[31]

The Board, however, fully reversed the Department's findings that DSWA violated its permits.[32] The Board first found that permit condition II.I.2 in DSWA's PTCTS permit is unlawful.[33] The Board then went on to find that DSWA did not violate its annual reporting requirements, because it did not have knowledge of Contractors at the time it submitted its annual reports.[34]

[30] (B00484); (B00005).
[31] (B00006-7); (B00488); (B00514).
[32] (B00149).
[33] (B00149).
[34] (B00149).

ARGUMENT

I. The Board Erred as a Matter of Law in Substituting its Judgment for that of the Secretary's.

A. Question Presented.

What is the appropriate standard of review the Board is to apply when reviewing the Secretary's determination that an environmental violation occurred under 7 *Del. C.* § 6008(b)? (B00654-655; B00666-668; B00672-673; B00697-700; B00705-706).

B. Standard of Review.

This Court reviews questions of law and statutory interpretation *de novo*.[35] Where the Court finds that the Board "abused its discretion, committed an error of law, or made findings of fact unsupported by substantial evidence," the Court should reverse the Board's decision.[36]

C. Merits of the Argument.

The Board is a "quasi-judicial review board" established under 7 *Del. C.* § 6007 to "hear appeals of decisions of the Secretary." Pursuant to 7 *Del. C.* § 6008(a), "any person whose interest is substantially affected by any action of the Secretary

[35] "Questions of law are reviewed de novo. Statutory interpretation is a question of law." *Delaware Dep't of Nat. Res. & Envtl. Control v. Sussex Cty.*, 34 A.3d 1087, 1090 (Del. 2011).

[36] *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1244 (Del. 1985) (citing *Kreshtool v. Delmarva Power and Light Co.*, 310 A.2d 649, 652 (Del. Super. Ct. 1973)).

may appeal to the Environmental Appeals Board. . . ." Section 6008(b) goes on to explain that Board's role in reviewing a Secretary's "case decision" is to determine whether the Secretary's decision is supported by the evidence before the Board.

> Whenever a final decision of the Secretary concerning any case decision, including but not limited to any permit or enforcement action is appealed, the Board shall hold a public hearing in accordance with Chapter 101 of Title 29. The record before the Board shall include the entire record before the Secretary. All parties to the appeal may appear personally or by counsel at the hearing and may produce any competent evidence in their behalf. The Board may exclude any evidence which is plainly irrelevant, immaterial, insubstantial, cumulative or unduly repetitive, and may limit unduly repetitive proof, rebuttal and cross-examination. The burden of proof is upon the appellant to show that the Secretary's decision is not supported by the evidence on the record before the Board. The Board may affirm, reverse or remand with instructions any appeal of a case decision of the Secretary." (Emphasis added).

On appeal to the Superior Court, the Department argued that under § 6008(b), the appropriate standard of the review that the Board was to apply to review the Secretary's Orders was whether the Secretary's decisions were supported by the evidence on the record before the Board.[37] Furthermore, the Department maintained that, just as it is settled law that Delaware Courts cannot substitute their judgment for that of the Board, it follows that neither can the Board substitute its judgment for

[37] *Del. Dep't of Nat. Res. & Envtl. Control*, 2020 WL 495210, at *8.

that of the Secretary's where the evidence of record supports the Secretary's decision, even if the Board would have reached a different conclusion.[38]

Relying on dictum from *Tulou v. Raytheon Serv. Co.*, the Superior Court found that the standard of review, or the level of deference that the Board must apply when reviewing a Secretary's decision depends on whether the initial full adversarial hearing is before the Secretary or before the Board.[39] The Superior Court thus held that where "the initial adversarial hearing was before the Board," the "Board [is] not required to provide 'explicit deference to the Secretary's expertise.'"[40] The Department, however, maintains that the Superior Court reliance on *Tulou* is misplaced and that its holding is contrary to § 6008(b)'s clear statutory language, therefore, the Department respectfully requests that this Court reverse the Superior Court's holding.[41]

First, the Superior Court acknowledges that its holding is based on dictum from *Tulou v. Raytheon Services*.[42] In *Tulou*, the Superior Court reviewed a Board

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[38] "[T]his Court does not substitute its judgment for that of the Board, even if it would have reached a different conclusion. *Tulou v. Raytheon Serv. Co.*, 659 A.2d 796, 802 (Del. Super. Ct. 1995). *See also, Protecting Our Indian River v. Delaware Dep't of Nat. Res. & Envtl. Control*, 2015 WL 5461204, at *6 (Del. Super. Ct. Aug. 14, 2015).

[39] *Del. Dep't of Nat. Res. & Envtl. Control*, 2020 WL 495210, at *8.

[40] *Id*.

[41] G&F and CH seek this Court's affirmance of the Superior Court's holding. *See* G&F and CH's Opening Brief at 16-20.

[42] *Del. Dep't of Nat. Res. & Envtl. Control*, 2020 WL 495210, at *8.

decision overturning a Secretary's Order that denied a permit following a hearing before the Secretary.[43] Thus, the question of what deference the Board is to give to a Secretary's enforcement decision where the Board holds the initial adversarial hearing was not before the Court in *Tulou*.[44]

Second, even if this Court finds the reasoning in *Tulou* persuasive, the burden under § 6008(b) to show that the Secretary's decision is not supported by the evidence remains the same regardless of whether the Board proceeding is the initial hearing or the second hearing.[45] While *Tulou* provides that an appellant's burden before the Board is "more substantial" where the Board proceeding is the second hearing, *Tulou* does not provide, as G&F and CH suggests, that an appellant is relieved of its burden under § 6008(b) to establish that the Secretary's decision is not supported by the evidence where the Board holds the initial hearing.[46] Thus, contrary to G&F and CH's assertion, even where the Board holds the initial adversarial hearing, the Board cannot simply substitute its judgment for that of the Secretary's where "the evidence on the record before the Board" supports the

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[43] *Tulou*, 659 A.2d 796.

[44] In noting that § 6008(b) applies where the Board holds the initial hearing and where the Board holds the second hearing, the *Tulou* Court acknowledged that the case before it involved the latter. *Id.* at 805-806.

[45] In *Tulou*, the Superior Court recognized that § 6008(b) is invoked on appeals of permit and enforcement decisions of the Secretary "when there has not been a hearing before the Secretary and where there has been a hearing." *Id.* at 805.

[46] *Id. See also* G&F and CH's Opening Brief at 17.

Secretary's decision.[47] And where the evidence on the record before the Board supports the Secretary's decision, the Board must affirm, even if it may have reached a different conclusion.

The Superior Court's decision also fails to consider that § 6005(b)(3) provided DSWA, G&F, and CH the choice of having an initial hearing before the Secretary before appealing the Secretary's Orders to the Board.[48] That an alleged violator may elect to forgo having the initial hearing before the Secretary and appeal the Secretary's Order directly to the Board under § 6008 cannot mean that the Board proceeding becomes a trial *de novo* as G&F and CH argue in their Opening Brief.[49] Rather, the Board's standard of review under § 6008(b) remains the same regardless of whether the Board proceeding is the first or the second hearing.[50] Therefore, the Department respectfully requests that the Court reverse the Superior Court's holding that the Board owes less deference to the Secretary's decision where the Board holds the initial adversarial hearing.

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[47] 7 *Del. C.* § 6008(b).

[48] 7 *Del. C.* § 6005(b)(3) provides, in relevant part, "Prior to assessment of an administrative penalty, written notice of the Secretary's proposal to impose such penalty shall be given to the violator, and the violator shall have 30 days from receipt of said notice to request a public hearing. Any public hearing, if requested, right of appeal and judicial appeal shall be conducted pursuant to §§ 6006-6009 of this title." Additionally, the Secretary's Orders at issue provided Appellees notice of their right to request a hearing before the Secretary under § 6005(b)(3) before appealing the Secretary's decision to the Board (B00001-00124).

[49] G&F and CH's Opening Brief at 17-20.

[50] *Tulou*, 659 A.2d at 805.

II. The Board Erred as a Matter of Law in Rescinding the Secretary's Imposition of Administrative Penalties.

A. Question Presented.

Does the Board have the authority set aside the Secretary's imposition of administrative penalties where the Board affirms the Secretary's finding of violation? (B00669-672; B00705-705).

B. Standard of Review.

The Court reviews questions of law and statutory interpretation *de novo*. Where the Court finds that the Board "abused its discretion, committed an error of law, or made findings of fact unsupported by substantial evidence," the Court should reverse the Board's decision.

C. Merits of the Argument.

On appeal to the Superior Court, the Department argued that the Board erred as a matter of law and exceeded its authority in setting aside the Secretary's imposition of administrative penalties. Although the Board affirmed the Secretary's findings as to G&F and CH's violations, the Board ultimately ordered that the Secretary rescind the penalties (and costs), because the Board determined the violations were the result of innocent mistake.[51] In contrast, G&F and CH argued,

[51] (B00149-151).

as they do before this Court, that the Board had the discretion to set aside the Secretary's administrative penalties.[52]

The Superior Court, relying again on *Tulou*, effectively held that the Board owed no deference to the Secretary's imposition of administrative penalties where the Board held the initial adversarial hearing.[53] However, the Court also noted in its decision that it was "concerned that the Board's conclusion that no penalties were appropriate was not well-considered."[54] The Superior proceeded to remand to the Board to determine the appropriate administrative penalties to impose for G&F's, CH's and DSWA's respective violations.[55]

The Department respectfully maintains that the Superior Court erred in holding that *Tulou* provides the appropriate standard of review for the Board's review of the Secretary's imposition of administrative penalties, and in charging the Board with determining the appropriate administrative penalties to impose for G&F's, CH's and DSWA's violations. In contrast, Delaware Courts recognize that when reviewing an administrative agency's decision to impose a penalty where the agency has discretion in choosing a penalty, the court should show deference to agency's decision, so long as the penalty imposed is "not outside its statutory

[52] G&F and CH's Opening Brief at 20-25.
[53] *Del. Dep't of Nat. Res. & Envtl. Control*, 2020 WL 495210, at *10.
[54] *Id.*
[55] *Id.*

confines, is based upon substantial evidence on the record, and [is] free from error of law."[56] For example, in *Kirpat, Inc. v. Delaware Alcoholic Beverage Control Commission*, the Superior Court explained, "In determining whether the penalty imposed [by the agency] is arbitrary and capricious, the question . . . is not whether this Court would have imposed the penalty but whether such punishment is so disproportionate to the offense in light of all the circumstances as to be shocking to one's sense of fairness."[57]

Section 6005(b)(3) provides the Secretary with broad discretion to "impose an administrative penalty of not more than $10,000.00 for each day of violation" on anyone who violates Chapter 60 of Title 7 or any rule or regulation adopted pursuant to Chapter 60 of Title 7. Section 6005(b)(3) further explains that the Secretary's

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[56] *Kirpat, Inc. v. Delaware Alcoholic Beverage Control Comm'n*, 1998 WL 731577, at *3 (Del. Super. Ct. Mar. 31, 1998). *Warmouth v. Delaware State Bd. of Examiners in Optometry*, 514 A.2d 1119, 1123 (Del. Super. Ct. 1985), *aff'd*, 511 A.2d 1 (Del. 1986) ("The choice of a penalty by an administrative agency if based on substantial evidence and not outside its statutory authority is a matter of discretion to be exercised solely by the agency.")

[57] *Kirpat, Inc*, 1998 WL 731577 at *3 (internal quotations and citations omitted). *Warmouth*, 514 A.2d at 1123 (Court explained that, in reviewing an agency's punishment, "the question is not whether this Court would have imposed a five-year revocation, but whether such punishment is so disproportionate to the offense in light of all the circumstances as to be shocking to one's sense of fairness."). *See also Jordan v. Smyrna Sch. Dist. Bd. of Educ.*, 2006 WL 1149149, at *1 (Del. Super. Ct. Feb. 15, 2006) ("Additionally, the State Board was required to uphold the punishment of the local board unless such punishment is so disproportionate to the offense in light of all the circumstances as to be shocking to one's sense of fairness."); and *Johns v. Council of Delaware Ass'n of Professional Engineers*, 2004 WL 1790119, at *5 (Del. Super. Ct. July 27, 2004).

"[a]ssessment of an administrative penalty shall be determined by the nature, circumstances, extent and gravity of the violation, or violations, ability of violator to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation and such other matters as justice may require." Given the broad discretion that § 6005(b)(3) affords the Secretary, the Board's review of the Secretary's imposition of an administrative penalty should similarly be limited to reviewing whether the penalty imposed is consistent with the § 6005(b)(3)'s statutory confines, is supported by the evidence on the record, and is free from error of law.

The Department, therefore, respectfully requests that this Court reverse the Superior Court's holding that *Tulou* provides the appropriate standard of review for the Board's review of the Secretary's imposition of administrative penalties.

III. The Department May Still Recover Costs in this Enforcement Action.

A. Question Presented.

Whether the Department can recover its costs under 7 *Del. C.* § 6005(c) upon submission of a detailed billing to DSWA, G&F, and CH? (B00656-658; B00685-688).

B. Standard of Review.

The Court reviews questions of law and statutory interpretation *de novo*. Where the Court finds that the Board "abused its discretion, committed an error of law, or made findings of fact unsupported by substantial evidence," the Court should reverse the Board's decision.

C. Merits of the Argument.

As an initial matter, the Department maintains that the Superior Court correctly held that "the Secretary's cost recovery decisions were not properly before the Board on appeal, and the Board did not have authority to review them," because DNREC had not submitted a detailed billing of expenses to DSWA, G&F, and CH at that time.[58] The Department, however, maintains that it may still recover its costs in this matter upon submission of a detailed billing to G&F, CH, and DSWA, and that review of the Department's cost recovery is to be in accordance with the process stated in 7 *Del. C.* § 6005(c).

[58] *Del. Dep't of Nat. Res. & Envtl. Control*, 2020 WL 495210, at *5.

1. **The Department is not Precluded from Seeking Cost Recovery in this Matter at a Later Date.**

Contrary to G&F and CH's assertion in its Opening Brief, the Department did not "concede[] that it cannot recover costs in this case,"[59] and nothing in the Superior Court's decision or § 6005(c) suggests that it is precluded from seeking recovery of its costs following resolution of DSWA's, G&F's and CH's liability for the cited violations. Section 6005(c) conditions DNREC's authority to recover its costs on DNREC first submitting a detailed billing to the liable person; however, there is no time requirement stated in § 6005(c) as to when the Department must submit the detailed billing, or be barred from later seeking recovery of its costs.

Furthermore, while the Department acknowledges that principles of fairness dictate that the Department should seek to recover its costs within a reasonable period of time, the Department maintains that it is certainly reasonable for the Department to delay submitting the detailed billing until after the responsible party's liability has been fully established. Thus, in the present case, the Department is not precluded from recovering its costs, and the Department may submit the required detailed billing to DSWA, G&F, and CH following final resolution of their liability.

[59] G&F and CH's Opening Brief at 20-25.

2. Review of the Department's Cost Recovery is Outside the Scope of the EAB's Jurisdiction.

The Department also maintains that the Board erred in holding that it has jurisdiction to review the Department's cost recovery. The Superior Court declined to address this issue, because of its holding that the issue of costs where not properly before the Board.[60] However, because the Department is still authorized to recover its costs in this action upon submission of the detailed billing, this Court should address whether the Board erred as a matter of law in holding that it has the authority to review the Department's cost recovery under § 6008, despite § 6005(c)'s more specific process for obtaining review of the Department's cost recovery.

The Department contends that the Board lacks jurisdiction to hear challenges to the Department's cost recovery, because the unambiguous language of 7 *Del. C.* § 6005(c) provides the specific process violators must follow to challenge the Department's cost recovery. The Board, however, rejected "DNREC's contention that it lacks jurisdiction to address the assessment of cost recovery in a DNREC enforcement action[,]" noting that "[7] *Del. C.* § 6008 contains no such limitation on the Board's jurisdiction."[61] In so holding, the Board erred as a matter of law.

Section 6005(c) provides a specific, detailed process that violators must follow to challenge the Department's cost recovery.

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[60] *Del. Dep't of Nat. Res. & Envtl. Control*, 2020 WL 495210, at *5.
[61] (B00149-150).

> (2) In the event the liable person desires to challenge the detailed billing submitted by the Secretary, such person shall, within 20 days of receipt of the detailed billing request an administrative hearing before the Secretary. Testimony at the administrative hearing shall be under oath and shall be restricted to issues relating to:
>
> a. The finding of violation; and
>
> b. The billing of expenses submitted by the Secretary.
>
> A verbatim transcript of testimony at the hearing shall be prepared and shall, along with the exhibits and other documents introduced by the Secretary or other party, constitute the record. The Secretary shall make findings of fact based on the record, and enter an order which shall contain reasons supporting the decision. An appeal of the decision of the Secretary may be perfected to Superior Court within 30 days of the decision of the Secretary. In lieu of holding an administrative hearing on the detailed billing, or in the event a liable person fails or refuses to pay any of the expenses listed in the detailed billing, the Secretary may seek to compel payment through the initiation of a civil action in any court of competent jurisdiction within the State of Delaware. This subsection shall not be affected by the appeal provisions of § 6008 of this title.[62] (Emphasis added).

Section 6005(c)'s specific process for challenging the Department's cost recovery is unambiguous and clearly excludes cost recovery from the Board's purview.

Delaware courts recognize that the "[g]enerally accepted principles of statutory construction provide that, to the extent of any conflict, the expression of legislative intent in a more specific and later-enacted statute controls the former, more general statute."[63] While § 6008 provides that the Board generally has

[62] 7 *Del. C.* § 6005(c) (emphasis added).
[63] *State v. Cook*, 600 A.2d 352, 355 n. 6 (Del. 1991) (emphasis added); *Turnbull v. Fink*, 1994 WL 89641, at *4 (Del. Super. Ct. Feb. 17, 1994) ("When confronted with general and specific statutes regarding the same issue, the specific statute prevails over the general statute.").

jurisdiction to hear challenges to any action of the Secretary that substantially affects the appellant's interest, it is completely silent on whether the Board has jurisdiction to review the Department's cost recovery. Thus, § 6008's general language must yield to § 6005(c)'s more specific language that expressly states that § 6008 shall not affect subsection 6005(c)'s process for challenging the Department's cost recovery. Therefore, this Court should find that the Board erred as a matter of law in holding that it has jurisdiction to review the Department's cost recovery under § 6008.[64]

[64] The Department also acknowledges that is not entitled to recover its costs until it provides Appellees the detailed billing that § 6005(c)(1) requires, and is therefore not formally seeking cost recovery from the Appellees at this time. Additionally, because the Department has not provided Appellees the detailed billing, Appellees' challenge to the Department's cost recovery is premature, because Appellees' receipt of the detailed billing is what triggers the 20-day deadline to request a hearing before the Secretary to challenge the cost recovery. 7 *Del. C.* § 6005(c)(1) ("The Secretary shall submit a detailed billing of expenses to the liable person.").

IV. Permit Condition II.I.2 is a Lawful Permit Condition.

A. Question Presented.

Whether the Department has the authority to include Condition II.I.2 in DSWA's PTCTS Permit? (B00659-666; B00689-696).

B. Standard of Review.

The Court reviews questions of law and statutory interpretation *de novo*. Where the Court finds that the Board "abused its discretion, committed an error of law, or made findings of fact unsupported by substantial evidence," the Court should reverse the Board's decision.

C. Merits of the Argument.

The Superior Court correctly held that under this Court's holding in *Formosa Plastics Corp. v. Wilson*, 504 A.2d 1083, 1089 (Del. 1986), the Department may include reasonable conditions in the permits it issues.[65] Furthermore, the Superior Court appropriately determined that § 6003(c) does not require that every permit condition have an explicit regulatory antecedent.[66] This Court should affirm the Superior Court's holding and further reject DSWA's arguments before this Court that the Department lacks the authority to include Condition II.I.2 in its PTCTS permit.[67]

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[65] *Del. Dep't of Nat. Res. & Envtl. Control*, 2020 WL 495210, at *6.
[66] *Id.*
[67] DSWA's Opening Brief at 14-19.

1. DNREC has the Authority to Include Reasonable Permit Conditions, such as Condition II.I.2, in DSWA's PTCTS Permit.

As an initial matter, the Superior Court correctly held that under this Court's holding in *Formosa Plastics Corp. v. Wilson*, the Department has the authority to include reasonable conditions in its permits, even if there is not a corresponding regulation that states the same requirement.[68]

In *Formosa*, this Court considered whether the Secretary has the power to revoke a license or permit where the enabling legislation "does not confer any specific power upon the Secretary to revoke [] licenses."[69] In holding that the Secretary has the power to revoke permits, the Court wrote:

> A further ground for our conclusion, respecting the Secretary's authority to revoke permits, is his unquestioned power to impose reasonable conditions upon their issuance. . . .
>
> In our opinion the authority to place such reasonable conditions upon the issuance of permits also confers a rectifying power to revoke them when the conditions are violated. Not only is this consistent with common sense, but it gives proper effect to the clear legislative mandate of 7 *Del. C.* § 6020 that the Act be liberally construed to achieve its purpose:
>
> > This chapter, being necessary for the welfare of the State and its inhabitants, shall be liberally construed in order to preserve the land, air and water resources of the State. 7 *Del. C.* § 6020.

[68] *Del. Dep't of Nat. Res. & Envtl. Control*, 2020 WL 495210, at *6.
[69] *Formosa Plastics Corp. v. Wilson*, 504 A.2d 1083, 1088 (Del. 1986).

> Although we recognize that broad and pervasive powers repose in the Secretary, it is not to be overlooked that procedural safeguards and fairness must accompany their exercise. . . .[70]

The Superior Court properly relied on this Court's holding in *Formosa* to hold that DNREC has the authority to include reasonable permit conditions.

The Superior Court's decision, while affirming DNREC's authority to include reasonable permit conditions in permits, stopped short of affirmatively stating that Condition II.I.2 is a reasonable permit condition (likely due its subsequent holding that Condition II.I.2 is unconstitutionally vague). The Department, however, maintains that Condition II.I.2 is not only reasonable, but necessary to ensuring that DSWA operates its PTCTS in compliance with Delaware's environmental laws and the *Regulations*.

By its very nature, the transportation of solid waste is inherent to the operations of a transfer station like PTCTS, because all waste brought to the transfer station must be subsequently transported, within 72 hours, to a landfill for final

[70] *Id*. at 1089. *See also*, *Stephen C. Glenn, Inc. v. Sussex Cty. Council*, 532 A.2d 80, 83 (Del. Ch. 1987) (Court held that County Council could include "special conditions" in a conditional use permit "even if the special condition imposed is not specifically set forth in the Sussex County Zoning Ordinance, if the special conditions are: 1) reasonably necessary to protect the public health, safety and welfare; 2) directly relate to the granted conditional use; and 3) do not violate the general intent of the conditional use provisions of the zoning ordinance." (Emphasis added)).

disposal.[71] Section 6003(a)(4) and 7 *Del. Admin. C.* § 1301-7.0 require that anyone engaging in the transportation of solid waste have a permit. Additionally, the transfer station regulations require that the operator have the necessary equipment to operate, which includes equipment to transport the waste.[72] Thus, requiring a transfer station operator like DSWA to ensure that all of the vehicles used to transport waste from its facility are properly permitted is fully consistent with its regulatory duties.[73]

Condition II.I.2 is one of three subparagraphs in Subsection II.I of DSWA's PTCTS Permit concerning DSWA's transfer of waste from PTCTS to the landfill. Condition II.I.1 states, "All waste materials transported off site shall be taken to a facility permitted to accept these solid wastes."[74] Condition II.I.3 states, "The DSWA shall not allow any tractor and semitrailer vehicle having 5 axles to depart

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[71] 7 *Del. Admin. C.* § 1301-10.5.2.1 ("Solid waste shall not remain at the transfer station for more than 72 hours without the written approval of the Department.") Additionally, Condition II.H.1 in DSWA's PTCTS Permit provides, "All waste materials delivered to the Transfer Station shall be transported off-site within 72 hours of deliver to the site." (B00484).

[72] 7 *Del. Admin. C.* § 1301-10.5.2.7 ("Adequate numbers and types of equipment commensurate with the size of the operation shall be available at the site to insure operation of the facility in accordance with the provisions of these regulations and the plan of operation.").

[73] *See Stephen C. Glenn, Inc.*, 532 A.2d at 83. (County Council can include "special conditions" that are "not specifically set forth in the . . . Zoning Ordinance" where the conditions "directly relate" to the permitted activity and "do not violate the general intent of the . . . zoning ordinance.").

[74] (B00484)

the Transfer Station with a gross vehicle weight in excess of 80,000 pounds."[75] Condition II.I.2 states,

> All vehicles transporting waste from the Transfer Station shall have a valid solid waste transporters permit issued by the DNREC. In their contracts with transporters hauling waste from the Transfer Station, the DSWA shall stipulate that the contractor maintain a valid solid waste transporter permit issued by the DNREC. DSWA shall investigate and determine the current validity of the permit if it has reason to suspect a permit is not valid. All vehicles transporting waste collected by the [Household Hazardous Waste] collection program from the Transfer Station shall have a valid hazardous waste transporters permit issued by the DNREC.[76]

The Department maintains that each of the four sentences in Condition II.I.2 imposes separate, but related obligations, on DSWA that are necessary to ensuring that DSWA's waste transfer operations at PTCTS are conducted in compliance with Delaware's environmental laws and the *Regulations Governing Solid Waste*. The first sentence of Condition II.I.2 requires that DSWA ensure that all vehicles transporting solid waste from the transfer station have a valid solid waste transporters permit issued by the DNREC. The second sentence explains that, if DSWA hires a contractor to transport the waste from PTCTS, it must include a stipulation in its contract that the contractor will maintain a valid solid waste transporter permit issued by the DNREC. The third sentence explains that DSWA must investigate and determine the validity of its or its contractor's solid waste

[75] (B00484).
[76] (B00484).

transporters permit if it has reason to suspect that permit is invalid. And the last sentence, much like the first, requires that DSWA ensure that all vehicles transporting waste collected by the [Household Hazardous Waste] collection program from the Transfer Station shall have a valid hazardous waste transporters permit issued by the DNREC. Thus, Condition II.I.2's four requirements are reasonable permit conditions that help ensure that DSWA's waste transfer operations at PTCTS are conducted in compliance Delaware's environmental laws and the Regulations Governing Solid Waste. The Department, therefore, maintains that this Court should find that Condition II.I.2 is a reasonable permit condition within the scope of DNREC's authority to include in DSWA's PTCTS permit.

2. <u>Condition II.I.2 has a Basis in Duly Promulgated Regulations</u>.

While DNREC maintains that its authority to include Condition II.I.2 in DSWA PTCTS permit is not contingent on there being an explicit regulatory antecedent, it does dispute DSWA's assertion that there is no basis in a duly promulgated regulation for Condition II.I.2.[77] To the contrary, Condition II.I.2 is wholly consistent with the *Regulations Governing Solid Waste*.

As noted above, the transportation of solid waste is an activity inherent to the operation of a transfer station like PTCTS. In order to operate PTCTS, DSWA must

[77] *See* DSWA's Opening Brief at 14-19.

ensure that it is able to transport the waste in compliance with the duly promulgated regulations governing the transportation of solid waste, which require that transporters have a valid permit.[78] Thus, Condition II.I.2's requirements that help ensure that DSWA's waste transfer activities are conducted in compliance with the regulations governing the transportation of solid waste are certainly "in accordance with" the Department's duly promulgated regulations.

DSWA does not dispute that DNREC has duly promulgated regulations governing the operation of transfer stations and the transportation of solid waste.[79] These duly promulgated regulations further require that all waste be transported from the transfer station within 72 hours, and that all solid waste be transported by a validly permitted transporter. Thus, Condition II.I.2's requirements that ensure that only validly permitted transporters are transporting waste from PTCTS clearly have a basis in DNREC's duly promulgated *Regulations Governing Solid Waste*.

3. Procedural Safeguards Accompany DNREC's Permitting Process.

DSWA's arguments that it was denied the procedural safeguards afforded by the APA are without merit.[80] As explained above, DNREC maintains that the requirements of Condition II.I.2 all have a basis within duly promulgated

[78] 7 *Del. Admin. C.* § 1301-7.0
[79] *See* 7 *Del. Admin. C.* §§ 1301-10; 1301-7.
[80] DSWA's Opening Brief at 17-18.

regulations, thus DSWA was afforded the due process protections of the Delaware APA when the Department promulgated the Delaware *Regulations Governing Solid Waste*.

Additionally, DSWA fails to acknowledge that DNREC's permitting process under 7 *Del. C.* § 6004 affords many of the same due process safeguards that the Delaware APA provides for promulgating regulations. Consistent with the holding in *Formosa Plastics*, the Department recognizes that its authority to impose permit conditions is limited, as the conditions must be "reasonable," and procedural safeguards must accompany the exercise of the Department's discretion in imposing such conditions.[81] The Department maintains that its permitting process under § 6004 provides numerous procedural safeguards, including a permit application process, public notice of the proposed permit, and an opportunity for a public hearing on the proposed permit.[82] Additionally, a permittee's due process rights are further protected by 7 *Del. C.* § 6008 in that a permittee can obtain judicial review of the Department's final permitting decision.

DSWA's assertion that DNREC's permitting process "is inherently coercive" is disparaging and unsupported.[83] DSWA has not pointed to any evidence that it was somehow "coerced" into accepting Condition II.I.2 in its permit. Furthermore,

[81] *Formosa Plastics Corp.*, 504 A.2d at 1089.
[82] 7 *Del. C.* § 6004.
[83] DSWA's Opening Brief at 18.

DSWA does not dispute that the Department incorporated Condition II.I.2 into its permit through the normal permitting process, nor does it claim that it was somehow denied the procedural safeguards that accompany the Department's normal permitting process.

DSWA offers an unreasonably narrow interpretation of § 6003(c) that is inconsistent with the Statute's plain language and the Department's authority to include reasonable permit conditions in the permits it issues. Additionally, it is undisputed that Condition II.I.2 was incorporated through the normal permitting process, which process afforded DSWA procedural safeguards. Therefore, this Court should reject DSWA's assertion that Condition II.I.2 is unlawful and hold that Condition II.I.2 is a reasonable and lawful permit condition.

V. Condition II.I.2 is not Unconstitutionally Vague.

A. Question Presented.

Whether the Superior Court erred in holding that Condition II.I.2 in DSWA's PTCTS permit is unconstitutionally vague? (B00659-666; B00689-696).

B. Standard of Review.

The Court reviews questions of law and statutory interpretation *de novo*. Where the Court finds that the Board "abused its discretion, committed an error of law, or made findings of fact unsupported by substantial evidence," the Court should reverse the Board's decision.

C. Merits of the Argument.

1. The Superior Court Erred in Holding that Condition II.I.2 is Unconstitutionally Vague.

The Superior Court erred as a matter of law in holding that Condition II.I.2 is unconstitutionally vague.[84] Because a person of ordinary intelligence engaged in the highly regulated activities of collecting, transporting, storing, processing, and disposing of solid wastes can understand what is required by Condition II.I.2, this Court should reverse the Superior Court's holding and reject DSWA's arguments to the contrary.[85]

[84] *Del. Dep't of Nat. Res. & Envtl. Control*, 2020 WL 495210, at *7.
[85] DSWA's Opening Brief at 20-27.

In *Wien v. State*, the Delaware Supreme Court explained that a statute is not unconstitutionally vague where a reasonable person in the same position would have understood what the statute requires.[86] Furthermore, "Courts review constitutional vagueness challenges within the context of the [challenger's] own conduct."[87] Therefore, the question is whether a reasonable person in DSWA's position should have known that any transportation of solid waste from PTCTS by a vehicle that does not have a valid solid waste transporters permit issued by the DNREC is a violation of Condition II.I.2.[88]

Additionally, when evaluating a constitutional vagueness challenge, courts should attempt "to construe the challenged language in such a manner as to avoid the infirmity."[89] In *State v. General Chem Corp*, the Superior Court considered a similar vagueness challenge to a DNREC statute that required reporting of an environmental discharge or release at the "earliest opportunity."[90] The Superior

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[86] *Wien v. State*, 882 A.2d 183, 187 (Del. 2005).
[87] *Id*. *See also, Crissman v. Delaware Harness Racing Commn.*, 791 A.2d 745, 748 (Del. 2002) ("[E]ven if the language of the rules may appear vague or overbroad, they will be upheld when applied to conduct that a reasonable person should have known was prohibited.")
[88] *Id.*
[89] "This Court has an obligation in a case where a statute is being challenged for vagueness to construe the statute in such a manner as to avoid the infirmity." *State v. Gen. Chem. Corp.*, 559 A.2d 292, 295 (Del. Super. Ct. 1988). *See also, Globe Liquor Co. v. Four Roses Distillers Co.*, 281 A.2d 19, 22 (Del. 1971) (Statute is not unconstitutionally vague if the courts can look through imprecision of language to the intent of the Legislature).
[90] *Gen. Chem. Corp.*, 559 A.2d at 294-97.

Court explained that while it could not give a "bright-line standard" upon which the definition of "earliest opportunity" could be based, it nevertheless found that the phrase could be defined in a manner by which the finder of fact could judge whether someone reported a discharge at the "earliest opportunity."[91] The Superior Court thus held in *General Chemical Corp*. that the statute at issue was not unconstitutionally vague, because it was able to interpret the statute in such a manner as to avoid the vagueness challenge.[92]

With respects to the Superior Court's analysis of Condition II.I.2, the Department respectfully contends that the Court erred in failing to address whether Condition II.I.2 could be interpreted in a reasonable manner as to avoid the potential vagueness challenge. First, the Superior Court erroneously concluded that Condition II.I.2 only imposes two obligations on DSWA, and that the first sentence "simply makes a statement that appears consistent with the regulatory scheme, i.e., that all vehicles transporting waste from PTCTS must have valid DNREC-issued permits."[93] As discussed above,[94] the first sentence of Condition II.I.2 obligates DSWA to

[91] *Id.* at 297.
[92] "By presenting factors by which a person subject to reporting and a finder of fact may determine what conduct violates the statute, this Court has interpreted the statute so as to avoid a vagueness challenge given the circumstances of this case. Therefore, the Court holds that the statute being challenged here [] is not void for vagueness as applied to General in this case." *Id*.
[93] *Del. Dep't of Nat. Res. & Envtl. Control*, 2020 WL 495210, at *7.
[94] *See* discussion *supra* Part III.1.

ensure that all vehicles transporting waste from its PTCTS have a valid DNREC-issued permit, as both § 1301-7.0 of the *Regulations* and § 6003(c)(4) provide that any person who transports solid waste must first obtain a permit from the Department. Such an obligation is consistent with other obligations in DSWA's PTCTS permit, such as the obligation to identify all transporters on its annual report regardless of whether DSWA has knowledge of the transporter.[95] Thus, a person of reasonable intelligence in DSWA's position subject to strict liability for permit noncompliance[96] should know that it is a violation of Condition II.I.2 if waste is transported from PTCTS by a vehicle(s) that did not have a valid solid waste transporters permit issued by the Department, regardless of whether DSWA or its agent(s) had reason to suspect that the vehicle was not validly permitted.

Furthermore, the Superior Court misconstrued the distinct purposes of the first and third sentences in Condition II.I.2 in holding that "the third sentence of the Condition is both superfluous and inconsistent with" the first sentence.[97] Contrary to the Superior Court's conclusion, the first and third sentences can reasonably be

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[95] Just as the Superior Court correctly held that DSWA is strictly liable for failing to identify all transporters that transported solid waste from its PTCTS on its annual report, the Department maintains DSWA's is strictly liable for violating Condition II.I.2 where the evidence of record establishes that a vehicle transported solid waste from PTCTS without having a valid solid waste transporters permit issued by the DNREC. *Del. Dep't of Nat. Res. & Envtl. Control*, 2020 WL 495210, at *8-9. *See also* discussion *infra* Part VI.

[96] 7 *Del. C.* § 6005. *See also* discussion *infra* Part VI.

[97] *Del. Dep't of Nat. Res. & Envtl. Control*, 2020 WL 495210, at *8-9.

harmonized, because the first and third sentences impose two related but distinct obligations on DSWA.

The first sentence requires that all vehicles transporting waste from PTCTS have a valid solid waste transporters permit issued by DNREC. The purpose of this requirement is to ensure that DSWA's waste transfer activities at PTCTS are conducted in compliance with the statutory and regulatory permitting requirements regarding the transportation of solid waste in Delaware. Thus, under § 6005(b)'s strict liability standard, DSWA violates the first requirement of Condition II.I.2 if any vehicle transports solid waste from PTCTS without having a valid solid waste transporters permit issued by DNREC, regardless of whether DSWA had reason to suspect that the vehicle was not validly permitted.

The third sentence, in turn, requires that DSWA "investigate and determine" whether its or its contractor's solid waste transporters permit is valid, if DSWA has reason to suspect that its permit or its contractor's permit may be invalid. The purpose of this requirement is to ensure that if circumstances arise that cause DSWA to suspect that its or its contractor's solid waste transporters permit is invalid, DSWA will take affirmative steps to investigate and determine whether its permit or its contractor's permit is in fact valid or invalid. This requirement further ensures that DSWA's waste transfer activities at PTCTS are conducted in compliance with the statutory and regulatory permitting requirements for the transportation of solid

waste. Thus, DSWA would be strictly liable under § 6005(b) for violating the third requirement of Condition II.I.2 if: (1) it has reason to suspect that its transporter's solid waste transporters permit is invalid; and (2) it subsequently fails to "investigate and determine the validity of the permit." However, whether any vehicle transported solid waste from PTCTS without a valid permit is immaterial to determining whether a violation of the third requirement of Condition II.I.2 occurred.

The Superior Court erred in holding that Condition II.I.2 is unconstitutionally vague, based on its conclusion that "DSWA's representatives might reasonably assume [from the language of the third sentence] that DSWA would be liable for violating the Condition only if its agents had reason to suspect the invalidity of contractor permits."[98] However, whether DSWA could reasonably interpret Condition II.I.2 in a manner that conflicts with the Department's interpretation is not the appropriate standard for evaluating DSWA's vagueness challenge. Rather, the Superior Court is obligated to determine whether the language in Condition II.I.2 can reasonably be interpreted in a manner as to avoid the claimed vagueness.[99] Because nothing in the Superior Court's decision states that Condition II.I.2 cannot be construed in a reasonable manner as to avoid DSWA's claimed ambiguity, the

[98] *Id*. at *8.
[99] *Gen. Chem. Corp.*, 559 A.2d at 295.

Department respectfully contends that the Superior Court erred in holding that Condition II.I.2 is unconstitutionally vague.

2. DSWA's Misconstrues Condition II.I.2.

In its Opening Brief before this Court, DSWA also argues that Condition II.I.2 is unconstitutionally vague, because the "investigate and determine" requirement is not expressly defined; and because DNREC purportedly failed to provide DSWA sufficient training or direction so that DSWA could comply with Condition II.I.2's requirements.[100] Both arguments are without merit.

DSWA essentially argues that Condition II.I.2 only requires that DSWA investigate and determine whether a permit is valid if DSWA has reason to suspect that its or its contractor solid waste transporters permit is invalid.[101] DSWA goes on to then assert that, absent clear regulatory or statutory directives defining what the terms "investigate" and "determine" require, Condition II.I.2 is unconstitutionally vague. DSWA's interpretation of Condition II.I.2, however, is unreasonable, particularly when considered in the context of DSWA's activities in operating a transfer station.

DSWA's narrow focus on the "investigate and determine" language in the third sentence in Condition II.I.2 is a red herring. By narrowly focusing on this

[100] DSWA's Opening Brief at 20-27.
[101] DSWA's Opening Brief at 15.

language, DSWA's attempts to argue that the third sentence of Condition II.I.2 is the only operative sentence imposing any requirement on DSWA. DSWA's interpretation, however, ignores that the first and third sentences can be reasonably interpreted as placing two separate obligations on DSWA.[102] The Department also notes that DSWA acknowledges in its Opening Brief that Condition II.I.2 imposes additional requirements beyond just the third sentence.[103] Thus, by ignoring the import of Condition II.I.2's first sentence, DSWA misconstrues Condition II.I.2's clear requirements.

Furthermore, DSWA mischaracterizes the requirements of Condition II.I.2's third sentence. DSWA asserts throughout its Opening Brief that the third sentence of Condition II.I.2 requires it to investigate the regulatory compliance of "unaffiliated third-parties."[104] However, it is inaccurate to describe the entities that DSWA employs to transport waste from PTCTS as "unaffiliated third-parties." DSWA is required to transfer all waste collected at PTCTS with 72 hours.[105] To comply with this requirement, DSWA can either perform the waste transportation

[102] *See* discussion *infra* Part III.1.
[103] "Condition II.I.2 requires, among other things, that 'DSWA shall investigate and determine the current validity of [a waste transporter's] permit if it has reason to suspect a permit is not valid." DSWA's Opening Brief at 15 (emphasis added).
[104] "Condition II.I.2 of the Transfer Station Permit requires DSWA to 'investigate and determine' the validity of permits of unaffiliated, third-party waste transporters . . . ." DSWA's Opening Brief at 4. *See also*, DSWA's Opening Brief at 15, 22, 25.
[105] *See* discussion *infra* Part III.

activates itself or hire a third party to perform the waste transportation activates on its behalf. Thus, Condition II.I.2 only requires DSWA to ensure that **its own** waste transportation activities at PTCTS, whether performed by a hired contractor or by DSWA directly, are conducted in compliance with the statutory and regulatory permitting requirements for the transportation of solid waste in Delaware.

The Department also believes that DSWA mischaracterizes the nature of the violation cited in the Secretary's Order as being based on DSWA's failure to investigate and determine whether CH had a valid solid waste transporters permit, as well as the extent to which it claims the Department has shifted its positions on what Condition II.I.2 requires. With respects to DSWA's violation of Condition II.I.2, Secretary's Order 2018-WH-0066, which is the operable document for purposes of DSWA's appeal to the Board, stated in relevant part:

> Per the above condition in Respondent's solid waste permit, "**all** solid waste transporters hauling waste from the transfer station **shall** have a valid solid waste transporter permit issued by the Department." . . . . DSWA's failure over the course of several months to ensure that all vehicles that transfer solid waste from its PTCTS possess a valid Delaware solid waste transporter permit is a violation of condition II.I.2 of the solid waste permit for PTCTS.[106]

The Secretary's Order thus determined, based on the evidence of record that CH's vehicles transported waste from PTCTS without having a valid permit, that DSWA violated the first sentence of Condition II.I.2, because it failed to ensure that

[106] (B00006) (emphasis in original).

all vehicles transporting waste from its PTCTS had a valid solid waste transporters permit issued by the Department. Nothing in the Secretary's Findings of Fact and Violation asserts that DSWA violated the third sentence of Condition II.I.2 by failing to perform an investigation. Thus, whether DSWA investigated whether CH's vehicles had a valid solid waste transporters permit is immaterial to the Secretary's conclusion that DSWA violated Condition II.I.2 based solely on the fact that CH vehicles transported waste from the PTCTS without having a valid solid waste transporters permit.[107]

DSWA's argument that there is also no direction and that the Department failed to provide training on how a transfer station operator is to ensure that all vehicles transporting waste from the transfer station have valid permits is also without merit. Condition II.I.2's requirements are straightforward and comprehendible by a person of common intelligence. As the owner/operator of a solid waste facility that involves the transportation of solid waste, DSWA is in the best position to know who is transporting waste from PTCTS on its behalf and whether they have a valid solid waste transporters permit. That is why a condition substantially similar to Condition II.I.2 has been in DSWA's PTCTS Permit since at least June of 2006, which was most recently renewed on February 22, 2019.[108]

[107] *See* discussion *infra* Part IV.
[108] Copies of DSWA's PTCTS Permits since June of 2006 (B00542).

Condition II.I.2 is not a complicated or vague obligation, nor one DSWA should be able to avoid complying with by pointing the finger at G&F and CH. Contrary to DSWA's protestations, a person of reasonable intelligence, particularly one who holds multiple solid waste permits can comprehend Condition II.I.2's requirements. Therefore, this Court should reject DSWA's self-serving arguments that it is unable to comprehend what Condition II.I.2 requires and reverse the Superior Court's holding that Condition II.I.2 is unconstitutionally vague.

VI. Condition II.I.2 is not an Unconstitutional Subdelegation of the Department's Enforcement Authority to DSWA.

A. Question Presented.

Whether the Department unconstitutionally subdelegated its enforcement authority to DSWA by including reasonable requirements in Condition II.I.2 that ensure that DSWA's own waste transfer activities are conducted in accordance with Delaware law and the Regulations Governing Solid Waste? (B00659-666; B00689-696).

B. Standard of Review.

The Court reviews questions of law and statutory interpretation *de novo*. Where the Court finds that the Board "abused its discretion, committed an error of law, or made findings of fact unsupported by substantial evidence," the Court should reverse the Board's decision.

C. Merits of the Argument.

DSWA asserts that Condition II.I.2 somehow impermissibly delegates the Department's enforcement powers to DSWA.[109] The Superior Court declined to consider this argument, due to its determination that Condition II.I.2 is unconstitutionally vague.[110] DSWA's subdelegation argument is without merit and should be rejected by this Court.

[109] DSWA's Opening Brief at 28-31.
[110] *Del. Dep't of Nat. Res. & Envtl. Control*, 2020 WL 495210, at *7.

DSWA makes much to do about the phrase, "investigate and determine" in Condition II.I.2, claiming this language deputizes it to enforce DNREC's permitting requirements.[111] However, nothing in Condition II.I.2 or DSWA's PTCTS permit in anyway confers, or even attempts to confer enforcement powers on DSWA. Rather, Condition II.I.2 imposes four obligations on DSWA that are intended to ensure that DSWA's own waste transfer operations at PTCTS are conducted in accordance with Delaware law and the *Regulations Governing Solid Waste*.[112] Furthermore, nothing in Condition II.I.2 empowers DSWA to take any sort of administrative, civil, or criminal enforcement action in order to enforce Delaware Law or the *Regulations Governing Solid Waste*.

The Department fully agrees that it is the entity charged with enforcing Delaware's environmental laws. That is precisely what the Department is doing here, by ensuring that those engaged in the collection, storage, transportation, or disposal of solid waste do so in accordance with § 6003(a)(4) and Delaware's *Regulations Governing Solid Waste*. That DNREC requires those engaged in a heavily regulated business to conduct all aspects of their activities in compliance with Delaware laws and regulations is in no way a delegation of the Department's

[111] *See also* discussion *infra* Parts III. & IV.
[112] *See* discussion *infra* Part IV.2.

enforcement responsibilities. The Court, therefore, should reject DSWA's subdelegation argument.

VII. The Superior Court Correctly Held That DSWA is Strictly Liable Under 7 *Del. C.* § 6005(b) for Violating its Permits' Annual Reporting Requirements.

A. Question Presented.

Whether the Superior Court correctly held that 7 *Del. C.* § 6005(b) imposes strict liability such that DSWA's lack of knowledge did not excuse its failure to identify CH on its Annual Reports? (B00666-669; B00701-704).

B. Standard of Review.

The Court reviews questions of law and statutory interpretation *de novo*. Where the Court finds that the Board "abused its discretion, committed an error of law, or made findings of fact unsupported by substantial evidence," the Court should reverse the Board's decision.

C. Merits of the Argument.

The Board reversed the Secretary's findings in Order 2018-WH-0066 that DSWA violated Condition III.B.2 of its PTCTS Permit and Condition V.B.3 of its CSWMC Permit by failing to report CH as a transporter of solid waste on its Annual Reports. The Board wrote, "The Board also agrees with DSWA's contention that it could not report that G&F was using vehicles owned by an affiliate in its Annual Report because it had no knowledge until after the Report was filed."[113]

[113] (B00149).

On appeal, the Superior Court reversed the Board's decision. The Superior Court held that, because § 6005(b) imposes a strict liability standard for determining whether DSWA violated Conditions III.B.2 and V.B.3, DSWA's lack of knowledge about CH is "irrelevant" in determining whether the violations occurred:

> DSWA "caused" the violation by failing to list all transporters that had hauled waste to and from its facilities during the previous year in accordance with Conditions III.B.2 and V.B.3. The fact that DSWA did not know that CH was hauling waste to and from its facilities is therefore irrelevant, since DSWA, regardless of its knowledge or lack thereof, was responsible for relaying this information to DNREC.
>
> . . . .
>
> The Court finds that because Section 6005(b) provides for strict liability and because Conditions III.B.2 and V.B.3 are valid "condition[s] of a permit issued pursuant to § 6003," and because DSWA violated these Conditions, the Board erred in finding that DSWA had not violated these Conditions.[114]

The Superior Court's holding is well supported, and DSWA's arguments to the contrary are without merit. Therefore, this Court should affirm the Superior Court's holding that DSWA violated Conditions III.B.2 and V.B.3.

DSWA advances two arguments before this Court: (1) that the Board's decision was a factual determination based on substantial evidence; and (2) that Conditions III.B.2 and V.B.3 only require that DSWA provide DNREC with a

[114] *Del. Dep't of Nat. Res. & Envtl. Control*, 2020 WL 495210, at *9.

"complete list of all transporters known to have hauled waste from the facility."[115] DSWA's arguments are unavailing.

Whether DSWA correctly characterizes the Board's decision as a "factual finding" is irrelevant. As the Superior Court correctly observed, whether the Board made the correct factual finding that DSWA did not know of CH's waste hauling activities at the time it submitted its annal report is immaterial to the question of whether DSWA violated Conditions III.B.2 and V.B.3 under § 6005(b).[116]

By excusing DSWA's permit violations based on a lack of knowledge, the Board went beyond making just a factual finding, and it erred as a matter of law by impermissibly adding a "state of mind" element to Delaware's strict liability environmental statute. Section 6005(b) provides, "Whoever violates this chapter or any rule or regulation duly promulgated thereunder, or any condition of a permit issued pursuant to § 6003 of this title, or any order of the Secretary, shall be punishable as follows." However, nothing in § 6005(b) conditions the existence of a permit violation on whether the person has knowledge or knowingly violates its permit condition. Thus, the Superior Court correctly held that because § 6005(b) is a strict liability statute, "the fact that DSWA did not know that CH was hauling

[115] DSWA's Opening Brief 32-36.
[116] *Del. Dep't of Nat. Res. & Envtl. Control*, 2020 WL 495210, at *9.

waste to and from its facilities is therefore irrelevant, since DSWA, regardless of its knowledge or lack thereof, was responsible for relaying this information to DNREC."[117]

DSWA's PTCTS and CSWMC Permits require DSWA to include all transporters on its Annual Reports, not just those transporters of which DSWA has knowledge.[118] At the heart of Conditions III.B.2 and V.B.3 (as well as Condition II.I.2) is the reasonable expectation that DSWA knows who is transporting waste at its facilities. Thus, contrary to DSWA's assertion, it is not being held liable for failing to do "what is factually impossible;" rather, it is liable for failing to know information that it is obligated to know.[119] As the Superior Court accurately explained, under Conditions III.B.3 and V.B.2, DSWA is responsible for knowing who is transporting waste at its facilities so that it can relay this information to DNREC in its Annual Reports.[120] Thus, the Superior Court correctly held that DSWA's own actions caused the violation.[121]

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[117] *Id.*
[118] (B00488; B00514).
[119] DSWA OB at 35 ("The Board's application of Conditions III.B.2 and V.B.3 is reasonable because it avoids the absurd result of imposing liability on DSWA for failing to do what is factually impossible: to report information not within DSWA's knowledge.")
[120] *Del. Dep't of Nat. Res. & Envtl. Control*, 2020 WL 495210, at *9.
[121] *Id.*

In contrast, DSWA's argument that it should not be liable for failing to know that which it is responsible for knowing encourages and rewards regulated entities for their ignorance about the goings-on at their facilities. This Court need not allow regulated entities to benefit from their own ignorance about what is occurring at their facilities. Therefore, this Court should affirm the Superior Court's holding that DSWA violated Condition III.B.2 and V.B.3 of its respective permits.

CONCLUSION

For the reasons set forth above, the Department respectfully requests for the reasons set forth above that this Court:

(I) **Reverse** the Superior Court's holding that the Board applied the appropriate standard in its review of the Secretary's Orders under *Tulou v. Raytheon Serv. Co.*

(II) **Reverse** the Superior Court's holding that the Board applied the appropriate standard to its review of the Secretary's imposition of administrative penalties under *Tulou v. Raytheon Serv. Co*.

(III) **Hold** that the Department is not precluded from recovering its costs in this matter at a later time, and that § 6005(c) more specific statutory directive governs judicial review of the Department's cost recovery.

(IV) **Affirm** the Superior Court's holding that § 6003(c) does not require that all permit conditions have an explicit regulatory antecedent and that the Department has the authority to include reasonable conditions in the permits it issues under *Formosa Plastics Corp. v. Wilson*.

(V) **Reverse** the Superior Court's holding that Condition II.I.2 is unconstitutionally vague.

(VI) **Hold** that Condition II.I.2 is not an unconstitutional subdelegation of the Department's enforcement authority to DSWA.

(VII) **Affirm** the Superior Court's holding that DSWA is strictly liable under 7 *Del. C.* § 6005(b) for violating its permits' annual reporting requirements.

Respectfully submitted,

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Dated: August 25, 2020