

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
OF THE STATE OF DELAWARE**

KEEP OUR WELLS CLEAN, et al.

Appellant,

v.

**DELAWARE DEPARTMENT
OF NATURAL RESOURCES AND
ENVIRONMENTAL CONTROL,
ARTESIAN WASTEWATER
MANAGEMENT, INC.**

Appellees.

EAB Appeal No. 2017-14

DECISION AND FINAL ORDER

Pursuant to due and proper notice of time and place of hearing served on all parties in interest, and to the public, the above-stated cause of action came before the Environmental Appeals Board (“Board”) on May 22, 2018 and March 12, 2019, in the Auditorium of the Richardson & Robbins Building, located at 89 Kings Highway, Dover, Kent County, Delaware.

Members of the Board present and constituting a quorum on May 22, 2018 were: Dean Holden (Chair), Michael Horsey, Robert Mulrooney, Sebastian LaRocca, Gordon Wood and Frances Riddle. Members of the Board present and constituting a quorum on March 12, 2019 were: Dean Holden (Chair), Michael Horsey, Robert Mulrooney, Sebastian LaRocca, Guy Marcozzi and Frances Riddle. No Board Members disqualified themselves or were otherwise disqualified. Deputy Attorney General Kevin P. Maloney represented the Board.

Kenneth T. Kristl, Esquire represented Appellant Keep Our Wells Clean (“KOWC”). Deputy Attorney General Devera B. Scott and Kayli H. Spialter represented Appellee Delaware

Department of Natural Resources and Environmental Control (“DNREC”). R. Judson Scaggs, Esquire and Barnaby Grzaslewicz, Esq. represented the permittee, Artesian Wastewater Management, Inc. (“Artesian”).

STATEMENT OF THE CASE AND PROCEEDINGS

Secretary’s Order No. 2017-W-0029

On November 2, 2017, DNREC issued Secretary’s Order No. 2017-W-0029 (the “Secretary’s Order”) which granted the application of Artesian to amend its construction permit (“the amended construction permit”) to construct Phase I of the Artesian Northern Sussex Regional Water Recharge Facility (“ANSRWRF”) near Milton, Sussex County, Delaware. On November 28, 2017, an association of unnamed individuals, Keep Our Wells Clean, and named individuals, Gail Solomon, Yauheniya Zialenskaya, Uladzislau Navitski, Thomas DiOrio, Lynn Taylor-Miller, Charlie Miller, and Virginia Weeks (“collectively KOWC”) filed a Statement of Appeal of the Secretary’s Order, pursuant to 7 *Del. C.* §§ 6008 and 6009 (the “KOWC Appeal”).

POSITIONS OF THE PARTIES

KOWC argued that the permit was issued without compliance with 7 *Del. Admin. C.* 7101 § 6.2.3’s requirement of a hydrogeologic suitability report (“HSR”) and 7 *Del. Admin. C.* 7101 § 6.2.4’s requirement of a surface water assessment report (“SWAR”). KOWC argued that the permit was issued without compliance with 7 *Del. Admin. C.* 7101 § 3.2’s requirement of zoning approval. KOWC originally argued that the permit lacks adequate monitoring and controls on the quality of the effluent to be received and that the permit does not comply with the TMDL for the Broadkill River. As discussed below, these last two of KOWC’s arguments were foreclosed by the Board’s decision on DNREC and Artesian’s Motion In Limine.

DNREC argued that since the original permit was issued prior to the 2014 amendment of the Regulations the amendments to the original permit should be considered under the same Regulations that applied to the original permit application which would mean that no HSR or SWAR was required. DNREC argued that even if the 2014 Regulations should have been applied, they provide that a new application, including a new HSR and SWAR, is not required if the amended permit application is filed before the original construction permit has expired or no changes have occurred.¹ DNREC argued that KOWC claims relating to the future treatment of wastewater, including wastewater treatment equipment and operational considerations, are not timely and not relevant to an amended construction permit.

Artesian argued that they did not have to comply with sections 6.2.3 and 6.2.4 of the 2014 Regulations because those sections were added after the Construction Permit was issued. Artesian argued that there is no requirement that construction permits comply with TMDL limits and that the Permit will result in a net decrease in Nitrogen and Phosphorous levels in the Broadkill River. Artesian argued that the quality of the wastewater will be monitored and controlled primarily at the Allen Harim site and under separate permits that have not yet been issued. Artesian argued the Secretary's determination that Sussex County approved a facility built in compliance with the permit amendment is supported by record evidence and was appropriate. Artesian also argued the Secretary's decision to allow an increase in the size of the storage pond is supported by record evidence and was appropriate. Finally, Artesian argued that the Secretary's decision to grant the amended construction permit, which allowed an increase in the size of the storage pond and acknowledged a different source of treated wastewater effluent

¹ 7 *Del. Admin. C.* 7101 § 6.3.1.1.14.

to be stored in the lagoon and disposed of onto the spray fields, is supported by record evidence and is appropriate.

BACKGROUND FACTS

Prior to the May 22, 2018 and March 12, 2019 hearings and in accordance with the Board's Regulations, DNREC provided the Board the Chronology consisting of the record before the Secretary with respect to the Order. In deciding this appeal, in addition to considering the Chronology, the Board considered the written submissions of the Parties, the testimony of all witnesses and the oral argument from the Parties. Following the presentation of evidence and closing arguments by each of the Parties, the Board entered into executive session as permitted by 7 *Del. C.* § 6008(a) to deliberate.

On October 15, 2013, the Department granted Artesian a permit to construct Phase I of its wastewater treatment facility at ANSRWRF. At that time, Artesian anticipated that Phase I ANSRWRF would treat domestic wastewater from a proposed housing development in the town of Milton, and ANSRWRF could serve future potential wastewater needs in the area. Originally, Phase I included construction of storage lagoons, spray fields, and the wastewater treatment plant.

In 2017, Artesian submitted an application to the Department to modify its existing and valid construction permit ("the amended permit application") in order to accept treated wastewater from Allen Harim Foods, LLC ("Allen Harim"). The amended permit application altered the scope of the construction activities by moving construction of the wastewater treatment plant to Phase II of the project. Phase I would still include construction of the spray fields, but as modified, Phase I would only construct one storage lagoon, moving construction of

the second storage lagoon to Phase II. Artesian reduced the overall number of storage lagoons for the project from three to two. The capacity of the Phase I storage lagoon was increased from 67.5 million gallons to 90 million gallons. Finally, instead of accepting domestic wastewater from the proposed residential development, the amended construction application considered that ANSRWRF would accept treated wastewater from Allen Harim.

On July 27, 2017, the Department held a public hearing on Artesian's amended permit application. Approximately 100 people attended the public hearing, and the Department received public comments. On October 2, 2017, the Groundwater Discharges Section submitted a technical response memorandum ("TRM") to the hearing officer addressing those public comments. The extensive public comments included questions about whether the amended permit application was complete, and whether the Department should have required a new application, and updated well survey, floodplain, and wetland information. The comments also inquired about the county's land use approvals, groundwater and drinking water concerns, surface water or soil contamination, odor, mosquito breeding, and Allen Harim's ability to treat the anticipated wastewater to spray irrigation standards.

On October 5, 2017, the hearing officer issued his report and considered the amended permit application and supporting documentation, the public comments, and the Groundwater Discharges Section's TRM. The Hearing Officer's Report memorialized the documentation submitted in connection with the amended permit application and established the Record. The Hearing Officer's Report found, among other things, that the Record, which included all of the timely and relevant public comments, supported approval of Artesian's amended permit application and issuance of an amended construction permit.

On November 2, 2017, the Department issued Secretary's Order No. 2017-W-0029, which approved the permit that was issued on November 3 ("Amended Permit."). The Secretary's Order considered the Hearing Officer's Report and the Record and directly addressed public comments. The Secretary's Order acknowledged the public comments about spray irrigation of treated wastewater and stated that Artesian would be required to obtain an operation permit that would regulate the operational issues raised in the public comments.

Likewise, similar to the original permit, the construction requirements for the Amended Permit clearly stated that the permit authorized "...**the construction of Phase I only.**" (Chronology exhibit 2)(Emphasis in original). The Amended Permit also emphasized that Artesian could not discharge any wastewater to the storage lagoons or spray irrigation system under to the terms of the Amended Permit. Artesian could apply for an operation permit once it received final construction approval.

On November 28, 2017, Appellants wrote to the Board and appealed the Secretary's Order Number 2017-W-0029. Appellants raised four issues on appeal: (1) the amended construction permit application did not comply with the Regulations as amended in 2014² which require the applicant to submit a Hydrogeologic Suitability Report ("HSR"), Surface Water Assessment Report ("SWAR"), and county or municipal land use approvals; (2) the Amended Permit does not comply with the TMDL for the Broadkill River; (3) the Amended Permit does not contemplate wastewater treatment at ANSRWRF; and (4) the Amended Permit is not supported by adequate technical documentation to approve a 90 million gallon storage lagoon.

The May 22, 2018 Appeal Hearing

² Regulations Governing the Design, Installation and Operation of On-Site Wastewater Treatment and Disposal Systems, 7 Del. Admin. C. § 7101.

Prior to the May 22, 2018 and March 12, 2019 hearings and in accordance with the Board's Regulations, DNREC provided the Board the Chronology consisting of the record before the Secretary with respect to the Order. In deciding this appeal, in addition to considering the Chronology, the Board considered the written submissions of the Parties, the testimony of all witnesses and the oral argument from the Parties. Following the presentation of evidence and closing arguments by each of the Parties, the Board entered into executive session as permitted by 7 *Del. C.* § 6008(a) to deliberate.

DNREC filed a Motion to Dismiss dated May 16, 2018 in which it argued that the Appeal must be dismissed because KOWC's claims are not ripe and KOWC have not established standing. KOWC filed a Response dated May 18, 2018. Artesian filed a Motion to Dismiss dated May 16, 2018 requesting that the Board, prior to the evidentiary portion of the hearing, dismiss the Appeal to the extent it is premised on DNREC's failure to require the submission of an HSR or SWAR as part of the amended application. KOWC filed a Response dated May 18, 2018.

DNREC filed a Motion in Limine dated May 16, 2018 in which it argued that the Board should preclude any evidence that is not related to the amended construction permit, including but not limited to, the Broadkill River TMDL and monitoring and/or control of the quality of the effluent. KOWC filed a Response dated May 18, 2018. Artesian filed a Motion in Limine dated May 16, 2018 requesting that the Board preclude the testimonies of KOWC's proposed witnesses John Austin and Christopher Grobel. KOWC filed a Response dated May 18, 2018.

On May 22, 2018, the Board addressed the Motions to Dismiss and the Motions in Limine before it. The Board heard the motion to dismiss related to KOWC's standing to bring the Appeal and voted 5-1 in favor of KOWC's standing to bring the Appeal due to potential injury in fact

relying, in part, on the *Oceanport* decision³. The Board voted 6-0 to deny DNREC's Motion to Dismiss on ripeness grounds concluding that KOWC's claims are timely and redressable because it is reasonable to conclude that the granting of the construction permit will lead to eventual operation. The Board voted 6-0 to deny Artesian's Motions to Dismiss as premature.

The Board voted 6-0 to grant DNREC's Motion In Limine "such that evidence presented must be limited to evidence before the Secretary that speaks to the proper site selection and system design and not the operations of the plant." Tr. at 167. The Board voted 6-0 to deny Artesian's Motion in Limine in light of its decision restricting the scope of permissible evidence to be introduced as a result of its ruling on DNREC's Motion in Limine.

The March 12, 2019 Appeal Hearing

As a consequence of the Board rulings at the May 22, 2018 hearing the issues presented for the March 12, 2019 hearing were limited to site selection and system design.

SUMMARY OF THE EVIDENCE

In its case-in-chief, appellant KOWC presented evidence of two witnesses: John G. Hayes, Jr. and Christopher P. Groebel. By agreement of the parties DNREC and Artesian questioned Mr. Hayes as if it were in the case-in-chief to avoid having to re-call the witness.

In response to direct examination by KOWC Mr. Hayes testified that:

- (1) He is employed by DNREC as the Program Manager for the Large Systems Branch, Ground Water Discharges section. Tr. II at p. 28.⁴

³ *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892 (Del. 1994). "[I]n instances where the environmental law is designed to prevent the occurrence of environmental degradation, it is sufficient to show that the injury may or will occur at some future date. 636 A.2d at 903 n.14.

⁴ The abbreviation "Tr. II" is used throughout this Order to refer to the transcript of the Board's hearing on March 12, 2019.

- (2) He was involved in DNREC's review of the amended construction permit which amended the 2013 permit and he was also involved in DNREC's issuance of the 2013 permit. Tr. II at p. 29.
- (3) The 2013 construction permit states "[t]he facility will be built in three phases with each phase capable of handling one million gallons per day" but that the permit was analyzed for site selection purposes as a facility that could handle 6 to 7 million gallons a day Tr. II at p. 32.
- (4) The 2017 permit authorized construction of "a storage lagoon and disposal spray fields, and to accept treated wastewater from Allen Harim Foods, LLC." Tr. II at p.34.
- (5) Between the issuance of the 2013 permit and the 2017 amended construction permit the DNREC regulations governing on-site wastewater disposal systems were amended and that he was directly involved in the development of the amended regulations. Tr. II at p.39.
- (6) The site selection process was not part of the change to the permit and DNREC "decided based on the changes that were proposed that there was no need to invoke the 2014 regulations for the entire permit amendment." Tr. II at p.39.
- (7) That Artesian did not submit a soil investigation report in connection with its application for the 2017 amended construction permit but that they had submitted a soil investigation report in connection with the 2013 permit. That during review of the 2017 amended construction permit application he reviewed the 2013 permit soil investigation report to determine if it complied with subsection 6.2.2 of the amended regulations. That he determined that no additional soil work was necessary for the 2017 amended construction permit application. Tr. II at pp. 59-62.

- (8) That the amended regulations requirement for submission of a SIR, HSR and SWAR prior to DNREC review of an application pertain to new applications and not existing ones. Tr. II at p.39.

In response to direct examination by DNREC Mr. Hayes testified that:

- (1) That subsection 6.5.3.3.1 of DNREC's amended regulations states "[i]n consultation with the permittee, the Department may modify or amend an existing permit provided that the modification would not result in an increased impact or risk to the environment or public health" and that the amended construction permit issued in 2017 was an amendment of the 2013 permit. Tr. II at p.74.
- (2) That subsection 6.3.1.1.14 also speaks to DNREC's ability to amend a permit and states that "[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" and that DNREC determined that the design had not changed to such an extent to require a new permit. Tr. II at p.76.
- (3) That the volume of water to be sprayed had not increased overall and was "still within the scope of the investigations that were performed." Tr. II at p.78.
- (4) That DNREC had the required zoning approval letters from Sussex County for the 2013 permit and confirmed approvals were valid for the amended construction permit. Tr. II at p.81.
- (5) That DNREC had information that was the functional equivalent of what would be contained in a HSR and a SWAR even though a HSR and a SWAR was not required for an amended permit. Tr. II at pp.85-87.

In response to direct examination by KOWC Mr. Grobbel testified that:

- (1) He has employed at Grobbel Environmental & Planning Associates for over 20 years with a focus on soil and groundwater work, does some regulatory work, expert witness work and has a Ph.D in environmental law. Tr. II at pp.111-113.
- (2) He has had to determine groundwater flow patterns and directions “many dozens of times” in the course of his work and that he has been qualified as an expert in court in issues related to hydrology and hydrogeology. He has reviewed information about ANSRWRF in preparation for his testimony Tr. II at pp.117-121.
- (3) Based on his reading of the law the HSR is designed “to characterize the hydrogeology, hydrology, soils of the site in conjunction with the features that surround it.” Tr. II at p.128.

DNREC and Artesian objected to the scope of Mr. Grobbel’s testimony as violating the limitations imposed by the Board’s ruling on the Motion in Limine and covering subject matter not included in KOWC’s Statement of Appeal. DNREC moved for a directed verdict arguing that a HSR, SWAR and the other requirements of section 6.2 of the amended regulations are not required for this amended construction permit application. After an executive session the Board instructed the parties that it wanted to hear legal argument from counsel on the issues of the necessity of a HSR and SWAR as part of the amended construction permit application and the issue of Sussex County zoning approval. After legal argument the Board again went into executive session to deliberate.

LEGAL CONCLUSIONS

The Board concludes as a matter of law that KOWC has standing to pursue this Appeal because it is reasonable to conclude that they may suffer injury in fact. The Board concludes as a matter of law that KOWC’s claims that the site selection and system design are inconsistent with

the activities authorized by the amended construction permit are ripe for adjudication. KOWC's claims are timely and redressable because it is reasonable to conclude that the amended construction permit will lead to eventual operation. The Board concludes as a matter of law that the scope of admissible evidence should be limited to evidence that was before the Secretary when he made the amended permit decision.⁵

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. DNREC concluded that a permit amendment is subject to the regulations that were in effect at the time of the initial permit application unless the changes are significant. In this case DNREC determined the changes are not significant enough to require the applicant to submit a new permit application. DNREC's determination is not unreasonable or clearly wrong.

The Board agrees with Artesian's contention, and finds as a matter of law, that it submitted the required plan, specifications and design engineer report contemplated by subsection 6.3.1.1.14. Lastly, the Board finds as a matter of fact that the Sussex County zoning approval allowed for a regional wastewater facility to serve multiple sources and that Sussex County was aware of the amended construction permit application and reaffirmed its conditional use approval. The Board finds as a matter of law that the Secretary had sufficient evidence to so conclude.

After deliberation and careful review of Parties' respective arguments and evidence, the Board, for the reasons above, by a vote of 6 to 0, affirms the Secretary's decision in EAB Appeal 2017- 14.

⁵ The Board's review of the Secretary's decision is limited to whether the Order "is supported by the evidence on the record..." *Schepens v. DNREC*, EAB Appeal No. 2017-02 at 3 (Del. EAB Feb. 1, 2018)(citing 7 Del. C. §6008(b). See also EAB Regulation 5.3.

IT IS SO ORDERED, this 10th day of June, 2019.

Dean Holden, Chairperson

The following Board members concur in this decision:

Date: _____

Robert Mulrooney
Board Member

Date: _____

Michael Horsey
Board Member

Date: _____

Frances Riddle
Board Member

Date: _____

Sebastian LaRocca
Board Member

Date: _____

Gordon Wood (attended May 22, 2018 hearing only)
Board Member

Date: _____

Guy Marcozzi (attended March 12, 2019 hearing only)
Board Member

EAB Appeal No. 2014-14 Decision and Final Order


Date: 6-10-2019



Dean Holden, Chairperson

EAB Appeal No. 2017-14 Decision and Final Order

Date: 6/10/2019



Robert Mulrooney, Board Member

EAB Appeal No. 2017-14 Decision and Final Order

Date: 6/10/19



Michael Horsey, Board Member

EAB Appeal No. 2017-14 Decision and Final Order

Date: 6/10/19


Frances Riddle, Board Member

EAB Appeal No. 2017-14 Decision and Final Order

Date: 06/10/2019

/s/ Sebastian LaRocca
Sebastian LaRocca, Board Member

EAB Appeal No. 2017-14 Decision and Final Order

Date: 06/10/2019

/s/ Gordon Wood
Gordon Wood, Board Member

IT IS SO ORDERED, this _____ day of June, 2019.

Dean Holden, Chairperson

The following Board members concur in this decision:

Date: _____

Robert Mulrooney
Board Member

Date: _____

Michael Horsey
Board Member

Date: _____

Frances Riddle
Board Member

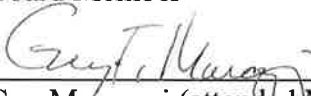
Date: _____

Sebastian LaRocca
Board Member

Date: _____

Gordon Wood (attended May 22, 2018 hearing only)
Board Member

Date: 6/10/19


Guy M / zzi (attended March 12, 2019 hearing only)
Board Member