IN THE CHANCERY COURT OF RANKIN COUNTY, MISSISSIPPI

GOLD COAST COMMODITIES, INC. **PLAINTIFF/APPELLANT**

vs. **CAUSE NO. 21-cv-717**

MISSISSIPPI ENVIRONMENTAL QUALITY PERMIT BOARD **DEFENDANT/APPELLEE**

MEMORANDUM BRIEF OF APPELLANT GOLD COAST COMMODITIES, INC.

Appellant Gold Coast Commodities, Inc. ("Gold Coast") submits this memorandum brief in support of its appeal of the action of the Mississippi Environmental Quality Permit Board (the "Permit Board") to revoke State Operating Permit No. MSU218003 (the "Permit"), requiring Gold Coast to cease operations at its wastewater treatment lagoon in rural Rankin County.

INTRODUCTION

The Permit Board ordered the revocation of Gold Coast's Permit on November 10, 2020, then affirmed its own decision on April 13, 2021. This matter is before the Court on Gold Coast's statutory appeal of the adverse decision of the Permit Board, by virtue of Miss. Code Ann. §49-17-29(4)(c), (5).

The Permit Board's revocation of Gold Coast's Permit should be reversed both because the Permit Board violated the law and because the Permit Board arbitrarily and capriciously acted on the basis of an undefined, subjective standard for revocation.

1. STANDARD OF REVIEW.

Administrative agencies in Mississippi no longer enjoy the kid glove treatment once granted their punitive decision-making. In 2018, after judicial discretion toward executive agency action had been out of balance for many years, our Supreme Court restored to the

judiciary its appropriate legal role in the review of executive agency decisions. *King vs. Miss. Military Dept,* 245 So. 3d 404 (Miss. 2018). The Court's opinion in *King* set aside a generation of well-intentioned but misinformed case law, and "established a new standard of review…." Of administrative agency actions. *HWCC-Tunica, Inc. v. Miss. Dep't of Revenue*, 296 So. 3d 668, 676 (Miss. 2020). The law in this state now is that this Court, as the interpreter of law, is no longer to grant deference to the Permit Board in the latter's legal pronouncements, analyses and conclusions.

In order to survive judicial scrutiny, an agency action must not be contrary to law. *King,* 245 So. 3d at 407. An administrative agency may not have "violated the complaining party's statutory or constitutional right." *Watkins Dev., LLC v. Hosemann*, 214 So. 3d 1050, 1053 (Miss. 2017). The Permit Board must have acted in compliance with statute and in protection of Gold Coast's statutory rights in order to revoke Gold Coast's Permit.

It did not.

Then, the agency's action must be rationally based – must not be arbitrary and capricious. *King,* 245 So. 3d at 407; *Watkins Dev., LLC v. Hosemann,* 214 So. 3d 1050, 1053 (Miss. 2017). In order to satisfy this hurdle, the Permit Board must be able to demonstrate an objective basis for its decision – an objective standard known to the world in advance, and not arrived at on the fly. *Miss. Air & Water Pollution Control Permit Board v. Pets & Such Foods, Inc*, 394 So.2d 1353, 1355 (Miss.1981).

It cannot.

With regard to evidentiary support for its ruling, the Permit Board need only be able to point to "substantial evidence," *King,* 245 So. 3d at 407, one of the lowest standards known to the law. 2 Am.Jur.2d Administrative Law § 537 Substantial Evidence Standard (1994). There is

little point in Gold Coast assailing the Permit Board's fact finding, jaundiced though it may be. But the fact that the Permit Board has papered the file adequately to step over the low "substantial evidence" does not serve as a step ladder for the Permit Board to reach the higher "objective basis" standard. Regardless that the Permit Board might make the case to this Court that "substantial evidence" backs its *fact* finding, it still must be able to demonstrate to the Court that it obeyed *statutory law* and that it relied on an *objective standard* in reaching its decision.

It will not.

The Permit Board both acted contrary to statute and also without objective basis in this case, and this Court may point to either deficiency in reversing.

2. **THE PERMIT BOARD BROKE THE LAW.**

It is a rare circumstance, indeed, for an agency action to be found illegal even *before* it is considered by an appellate court. But that is exactly what happened in this case.

In the weeks leading up to the November 10, 2020 revocation action by the Permit Board, Permit Board members exchanged numerous email messages among themselves, demonstrating their determination to punish Gold Coast in some way, including even the prospect of forcing them out of business. Supplement to Gold Coast's Motion for Continuance and Stay, and Second Supplement to Gold Coast's Motion for Rescission of Permit Revocation, Exhibit A, MEQPB/GCC 1022 (Permit Board member Dennis Riecke to Chairman Jennifer Wittman: "I hope EPA fines [Gold Coast] so bad they cease operations."); Supplement to Gold Coast's Motion for Continuance and Stay, and Second Supplement to Gold Coast's Motion for Rescission of Permit Revocation, Exhibit A, MEQPB/GCC 1029 (Permit Board member Dennis Riecke referring to Gold Coast: "Bad characters who should go out of business. The poster child for bad corporate citizens. Skewer them."); Supplement to Gold Coast's Motion for Rescission

of Permit Revocation, Exhibit A, MEQPB/GCC 849 (Permit Board member Les Herington in reference to a blog post titled "MDEQ: Gold Coast Must Shut Down Acid Lagoon": "My thanks to MDEQ staff for their expeditious work on this issue. No one can say DEQ didn't give GCC multiple opportunities to demonstrate they could be good actors before reaching this decision."); Supplement to Gold Coast's Motion for Rescission of Permit Revocation, Exhibit A, MEQPB/GCC 850 (Mr. Herrington discussing MDEQ involvement with Gold Coast: "…if we as a board have a role to play in this instance to assist MDEQ in the protection of human health and the environment, I'm happy to take appropriate action within our authority."); Supplement to Gold Coast's Motion for Rescission of Permit Revocation, Exhibit A, MEQPB/GCC 850 (Mr. Herington in response to blog posts about Gold Coast: "… [Gold Coast's] continued role as an apparent bad actor is very concerning … Roy, is MDEQ staff confident current enforcement actions will address and remedy the noncompliance, or is staff considering a recommendation to revoke this NPDES [*sic*] permit?"); Supplement to Gold Coast's Motion for Rescission of Permit Revocation, Exhibit A, MEQPB/GCC 871 (Permit Board chairman Jennifer Wittman sharing links to blog posts: "Below are links to articles concerning the Gold Coast Commodities, Inc. project… I will be requesting that an item be placed on the agenda for the next Permit Board meeting to discuss the status of the project. Just wanted to give you a little background information.")

Gold Coast obtained copies of the offending email messages through a series of public records act requests, since the Permit Board does not allow itself to be subpoenaed for purposes of discovery – only one example of how the Government favors itself with treatment different from that which applies to adverse parties and non-party witnesses. Upon discovering the illegal – and clearly biased – private chatter between members of the Permit Board, Gold Coast filed a

formal complaint with the Mississippi Ethics Commission, citing the Open Meetings Act and pointing out that the Permit Board had violated the Act by its strident, non-public communications on the merits of a matter within its jurisdiction.

The Mississippi Ethics Commission found that Gold Coasts' complaint was well-taken. The Ethics Commission entered a formal, final order, not even appealed by the Permit Board, holding the Permit Board in violation of the Open Meetings Act with respect to its communications about Gold Coast's Permit out of the presence of the public. A true and accurate copy of the July 22, 2021 Final Order of the Ethics Commission is attached as Exhibit "A" and incorporated by reference.[1]

The matter should end there. Where an administrative agency has acted contrary to law, its action may not stand and reversal is required. An administrative agency may not have "violated the complaining party's statutory or constitutional right." *Watkins Dev., LLC v. Hosemann*, 214 So. 3d 1050, 1053 (Miss. 2017).

But, in the wake of the Permit Board's violation of Gold Coast's statutory rights, there has been some talk in this matter of whether Gold Coast was "prejudiced" by the Government's illegal actions.

The law does not require that Gold Coast must somehow prove that it was "prejudiced" when the Permit Board violated its statutory rights – the violation itself is prejudicial and undermines the subsequent decision of the agency and public confidence in government actions. "However inconvenient openness may be to some, it is the legislatively decreed public policy of

[1] While this appeal from the wrongful action of an administrative agency is on the record created below, this Court is permitted to consider the rulings of courts or other authoritative tribunals that bear on the matters before the Court. *See McNeese v. McNeese*, 119 So. 3d 264, 277 n.5 (Miss. 2013) (citing the power of appellate courts to take "notice of the status of cases in other courts or agencies involving the same parties or related to the matter at hand"); *see also Opoka v. Immigration & Naturalization Serv.*, 94 F.3d 392, 394-95 (7th Cir. 1996) (citing the power of courts to take judicial notice, at any stage of the proceedings, of relevant decisions of other courts and administrative agencies that are directly related to the matter at hand).

this state." *Mayor & Aldermen of Vicksburg v. Vicksburg Printing and Pub'g*, 434 So. 2d 1333, 1336 (Miss. 1983).

Besides, it is too clever by half for the Permit Board to argue that there has been no prejudice merely because Gold Coast later went through the full evidentiary hearing separately guaranteed it by another statute. Permit Board members *prejudged* Gold Coast's rights and *prejudged* the decision the Permit Board was to reach. Supplement to Gold Coast's Motion for Rescission of Permit Revocation, Exhibit A, MEQPB/GCC 849 (Permit Board member Les Herington in reference to a blog post titled "MDEQ: Gold Coast Must Shut Down Acid Lagoon": "My thanks to MDEQ staff for their expeditious work on this issue. No one can say DEQ didn't give GCC multiple opportunities to demonstrate they could be good actors before reaching this decision."); Supplement to Gold Coast's Motion for Rescission of Permit Revocation, Exhibit A, MEQPB/GCC 850 (Mr. Herrington discussing MDEQ involvement with Gold Coast: "…if we as a board have a role to play in this instance to assist MDEQ in the protection of human health and the environment, I'm happy to take appropriate action within our authority."); Supplement to Gold Coast's Motion for Rescission of Permit Revocation, Exhibit A, MEQPB/GCC 850 (Mr. Herington in response to blog posts about Gold Coast: "… [Gold Coast's] continued role as an apparent bad actor is very concerning … Roy, is MDEQ staff confident current enforcement actions will address and remedy the noncompliance, or is staff considering a recommendation to revoke this NPDES permit?"); Supplement to Gold Coast's Motion for Rescission of Permit Revocation, Exhibit A, MEQPB/GCC 871 (Permit Board chairman Jennifer Wittman sharing links to blog posts: "Below are links to articles concerning the Gold Coast Commodities, Inc. project… I will be requesting that an item be placed on the agenda for the next Permit Board meeting to discuss the status of the project. Just wanted to give

you a little background information.") How could there be a more dramatic showing of *prejudice* than written proof that a matter that was supposed to be conducted in the public eye had a *prejudged* result before it was even heard?

According to Merriam-Webster, "prejudice" is "injury or damage resulting from some judgment or action of another in disregard of one's rights"; or a "preconceived judgment or opinion"; or "an adverse opinion or leaning formed…before sufficient knowledge."[2] It is difficult to imagine circumstances that more perfectly fit all three of the dictionary definitions of "prejudice" than what happened in this case.

In addition, the Permit Board demonstrated its prejudice regarding Gold Coast's case in other ways. In late October, 2020, after a November 19, 2020 evidentiary hearing on parallel matters already had been set before the Mississippi Commission on Environmental Quality (the "Commission"), the Permit Board set a November 10, 2020 meeting to consider Gold Coast's Permit. R. MEQPB/GCC 2-3.

Then, the Permit Board denied Gold Coast's motion for a continuance of the November 10, 2020 meeting despite Gold Coast's motion for continuance premised on the fact that lead counsel for Gold Coast had been ordered to oral argument before the Mississippi Supreme Court on that date. Motion to Continue Consideration of Permit Due to Prior Setting of Evidentiary Hearing and Subsequent Setting of Oral Argument in Mississippi Supreme Court, MEQPB/GCC 111.

Still not done, the Permit Board also denied Gold Coast's motion for alternative hearing procedures, to which even the Permit Board's attorneys did not object. Minutes of the April 6, 2021 Special Meeting of the Permit Board, MEQPB/GCC 1245.

[2] "Full Definition of *prejudice*," (Entry 1 of 2), Merriam-Webster Online Dictionary, merriam-webster.com, accessed September 18, 2021.

And, in case Gold Coast still had not received the message that the result in its case was predetermined, the Permit Board refused to grant a continuance of the April 13, 2021 evidentiary hearing in light of the disclosure of the email traffic among its members demonstrating that it had prejudged Gold Coast's case, and denied Gold Coast's motion to rescind the revocation of the Permit in light of those same email messages. Supplement to Gold Coast's Motion for Rescission of Permit Revocation, MEQPB/GCC 836-956; Supplement to Gold Coast's Motion for Continuance and Stay, and Second Supplement to Gold Coast's Motion for Rescission of Permit Revocation, MEQPB/GCC957-1047; Motion for Leave to File Third Supplement to Motion for Rescission of Revocation, MEQPB/GCC 1233-1244; Hearing Officer's Order on Pre-hearing Motions, MEQPB/GCC 1272-1278.

Gold Coast need not have been prejudiced by the Permit Board's illegal action in order for reversal to be the correct result here. The Permit Board acted contrary to law and in doing, violated Gold Coast's statutory rights, a clear basis for reversal of an administrative action according to this Court's standard of review. Moreover, Gold Coast *was* prejudiced – because its case was prejudged – and the Permit Board persistently refused to acknowledge its illegal acts or to grant Gold Coast relief from the untenable scenario the Permit Board created.

The Permit Board's revocation of Gold Coast's Permit should be reversed, because the Permit Board acted contrary to law, a violation that is documented in a final order of the Mississippi Ethics Commission, never appealed by the Permit Board.

3. **THE PERMIT BOARD ROLLED OUT A SUBJECTIVE, AFTER-THE-FACT STANDARD TO REVOKE GOLD COAST'S PERMIT.**

Reversal of the Permit Board's action is necessary for yet a separate reason: the Permit Board revoked the Permit "for cause," without supplying the public or the permittee with an objective standard of what constitutes "cause."

a. The Permit Board may not define "cause" for itself, after the fact.

The Permit provides that revocation/termination of the Permit may be "for cause." *See* Condition T-35 of the Permit, R. MEQPB/GCC 1777. But neither the Permit nor any pre-published rule or regulation of the Permit Board defines "cause" for purposes of revocation, nor is there any objective standard of any kind set out to describe to a permittee the bases upon which the Permit Board may take the ultimate punitive step of permit revocation.

That situation is a case study for arbitrary and capricious government action. *Permit Board vs. Pets & Such,* 394 So. 2d at 1355 (finding that the Permit Board acted arbitrarily and capriciously, having no preset rules and regulations regarding odor).

The Permit Board's many efforts to paper over the absence of any objective basis for its punitive action only demonstrate more clearly why the law requires objective standards in advance, not subjective explanations after the fact for why an agency acted as it did.

For example, the Permit Board takes the position that it may define for itself as it goes what constitutes "cause." Affidavit of Krystal Rudolph, R. MEQPB/GCC 2552, ¶6; Conclusions of Law, MEQPB/GCC 91, ¶71. Of course, if ever there is an action of Government that fits squarely in the realm of arbitrary and capricious action it is when the Government makes up its rules as it goes along, in a sort of marriage between *ex post facto* law-making on the one hand and a system of personal biases and philosophies rather than a system of laws on the other.

b. The Permit Board's attorney may not define "cause" by giving advice to his client.

Then, presumably thinking its belt too thin, the Permit Board straps on a pair of suspenders and says that "cause" means "violations of the permit." R. MEQPB/GCC 91, ¶70. Set aside for the moment the fact that there exists no pre-hearing definition of "cause" that says any such thing, and set aside for the moment the fact that the Permit itself says no such thing.

Consider, instead, how the Permit Board backs its way to the position that "cause" can mean "permit violations."

The Permit Board asserts in its Conclusions of Law that Gold Coast "knew" that permit violations constituted "cause" for purposes of revocation, R. MEQPB/GCC 91, ¶70, and in support directs the Court to an excerpt of the transcript of the August 13, 2019[3] Permit Board meeting:

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23 MR. HERRINGTON: I'm sorry. I do have
24 another question. If the permit was to be issued,
25 what does it take to revoke an issue from a
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1 compliance stand -- on, on this particular permit,
2 or, I mean, or are we just talking about more
3 enforcement penalties?

4 MR. FURRH: Well I think that if there
5 were significant, enough violations, DEQ may come
6 forward to the permit board and request a revocation
7 of the permit. I think that's possible. If there's
8 cause, I think that DEQ would do that, departments
9 issued and compliance issues at the site later.

10 MR. HERRINGTON: If a permit is, is, is
11 revoked, are penalties usually associated or is that
12 an action that's taken before a revocate?

13 MR. FURRH: Penalties could be associated
14 also.

15 MR. HERRINGTON: All right, thank you.

16 MS. WITTMANN: Okay, so as a follow-up to
17 that, if the permit was issued, could there be more,
18 and I know that, you know, staff is already busy and
19 stretched thin, but if there have been a -- if
20 there's been a history of a compliance issue, would
21 there be more -- the ability to have more compliance
22 inspection at the site, either regular or

[3] The record transcript of the meeting bears both the date of August 13, 2019 and the date of August 13, 2020, but the meeting took place in 2019.

unscheduled, whatever it may be so that that way, you know, the compliance history, is kind of what gives me the concern, and in order to ensure that if

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this is approved, that we are remaining in compliance, and then if there is a compliance issue and it is an ongoing compliance issue, that there could be the ability to revoke the permit if needed. Knowing that there would be more regular compliance checks or inspections that were, like I said, either scheduled or not scheduled. I mean, DMR staff can show up and check what's going on at any time.

MR. HERRINGTON: Do these usually have a normal compliance schedule for inspection or is this kind of an at DEQ's discretion when they decide to go out --

UNIDENTIFIED SPEAKER: Yeah.

MR. HERRINGTON: -- or do they follow up on --

UNIDENTIFIED SPEAKER: I think Tim's gonna elaborate, but I think we have similar authorities, Jennifer, to do unannounced inspections --

MS. WITTMANN: And, and I'm not trying to add more but --

UNIDENTIFIED SPEAKER: So, but I'll let Tim...

MR. TIM: Well, I guess, and maybe I need to -- I was having a sidebar and I apologize.

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But as far as unannounced inspection, yes, that is what we typically do at DEQ, is unannounced inspections. There are very few facilities where if we needed to gain access to a facility that was unmanned or had batched discharges and so forth, we would contact them the day before possibly. But typically are unannounced.

MS. WITTMANN: And does your staff have the ability to do increased inspections in a, with a specific applicant that has a compliance history issue?

MR. TIM: I think the short answer to that is, yes.

MS. WITTMANN: Okay.

THE HEARING OFFICER: And to follow up with that, if the permit was issued and there was a compliance issue that arose, they could revert back

to exporting outside of the state with their waste.
MR. FURRH: I think we'd have to act on the permit again. Yeah, it'd have to be revoked.
THE HEARING OFFICER: It would be automatic.
MR. FURRH: It would not.
MR. TIM: Oh, so then let me ask a question just clarifying, about the unannounced
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inspections. So was, was the question about, do we conduct unannounced inspections or do we do inspections of this type of facility with this type of permit?
MS. WITTMANN: Both.
MR. TIM: Okay, both.
Okay. So I answered the part about the unannounced inspections. So our commitments regarding these types of facilities, there is no commitment to do inspection, however, we would do inspections if we had complaints lodged against the facility or if we had a compliance history that made us concerned about a facility, we could do inspections at those.
MR. HERRINGTON: So what you're saying is these are basically complaint-driven inspections that would trigger an unannounced inspection?
MR. TIM: That is correct.
MR. HERRINGTON: Can -- does DEQ have the resources to, you know, to do inspections unannounced on their own, without the complaint?
MR. TIM: I think the answer is yes, we could do those types of inspections if we had a facility that we had compliance issues with or concerns over.
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MR. HERRINGTON: I mean, I'm not suggesting that they're gonna be out of compliance.
MS. WITTMANN: Right.
MR. TIM: Right.
MR. HERRINGTON: I mean, with the compliance history, if they want the board to approve their permit, I don't think it would be too much to ask them to tolerate inspections, unannounced inspections, to make sure that they're in compliance as long as DEQ has the capability of doing that.
MR. TIM: And there'll be a condition in

13 this permit that requires them to allow us access to
14 the facility to access records and inspect them.

R. MEQPB/GCC 1729 - 1734 (highlighting added).

The "Mr. Furrh" quoted in the transcript excerpted above is Roy Furrh, Senior Counsel to the Mississippi Department of Environmental Quality ("MDEQ"), and, by virtue of that position, chief counsel to the Permit Board and lead prosecutor for the revocation action taken against Gold Coast by the Permit Board. He is also adverse counsel in the appeal now pending before this Court.

It is important to review what Mr. Furrh said and what he did not say when responding to questions from his client:

> MR. FURRH: Well *I think* that if there were *significant, enough* violations, DEQ *may come forward* to the permit board and request a revocation of the permit. *I think that's possible. If there's cause, I think* that DEQ would do that, departments issued and compliance issues at the site later.

R. MEQPB/GCC 1730 (emphasis added).

So, the position taken by the Government before the Court today is that the Permit Board was justified in revoking Gold Coast's Permit because the Permit Board's lawyer told his client that he "think[s]" if it's "significant, enough," MDEQ "may come forward," that "[he] think[s] that's possible," and that "[i]f there's cause, [he] "think[s] [M]DEQ would do that…."

That equivocal answer does not an objective standard make.

Indeed, nothing about what Mr. Furrh said, or what anyone else said in the lengthy exchange on which the Permit Board now relies to try to craft a position that it acted on an objective standard, gives the public or a permittee a basis to know what constitutes "cause" for purposes of revocation.

Later in the conversation with his client, Mr. Furrh expressly states that revocation is not automatic, that the Permit Board would have to act to revoke the Permit if it wished to do so. R. MEQPB/GCC 1732. That concession indicates that Mr. Furrh knew that the Permit Board would have to act in a lawful matter and on an objective basis if it later wished to revoke Gold Coast's Permit.

This point is much more than simply a legal argument.

Compare the revocation of the Permit to the revocation of a person's driver's license. In both cases, the authority granted by the Government is a privilege and not a right, and in both cases the privilege may be revoked – but only where the law so provides.

A licensed driver knows that if he is not impaired when driving and gets a speeding ticket, or his engine blows oil all over the highway, or even if he is in a very serious accident resulting in injury, his license is not subject to revocation. But he also knows that if he drives under the influence of alcohol or other substances, that his license could legally be suspended or revoked altogether. And how does he know this? He knows it because the law says so; the penalty is not arrived at later, willy-nilly, based on what a prosecutor thinks is maybe significant, enough, or possible or what she thinks may happen.

Similarly, under our law a permittee may conduct its business and if a permit violation occurs, or if more than one permit violation occurs, or even if an accident occurs at a permitted site, the underlying permit will not be revoked unless a specific, published basis for revocation has occurred.

Could the Permit Board have published a regulation – or inserted language into the Permit – to the effect that violation of specific permit conditions, or of a specified number of conditions, or accidents of a particular character would result in revocation of the Permit?

Of course the Permit Board could have. But it did not.

What the Permit Board did instead is to advise Gold Coast that its Permit could be revoked "for cause," never bothering to advise Gold Coast of what constituted "cause" until the Permit Board published its laundry list of ways to define "cause" in the conclusions of law flowing from the April 13, 2021 evidentiary hearing. That way of doing business constitutes an arbitrary and capricious condition, and the Permit Board's revocation of the Permit without objective basis is reversible error as a matter of law.

The Permit Board has known this proposition of law for 40 years, and still came up short here. Following its failure as documented in the 1981 decision in *Permit Board vs. Pets & Such*, 394 So. 2d 1353, the Permit Board (or the Commission) did, in fact, finally promulgate objective standards for what constitutes nuisance odors in Mississippi.

The same thing could have been done with respect to promulgation of a definition for "cause" for revocation of a permit. But it never has, and the Permit Board cannot now be heard to claim that it can define "cause" after the fact, any more than it was allowed to define "odor" after the fact in 1981.

c. The Permit Board's authorizing statute does not create an objective standard or definition of "cause."

The Permit Board suggests that somehow its authorizing statute provides it with a hook of an objective standard on which it may hang its hat. R. MEQPB/GCC 91, ¶70.

The Permit Board's favorite statute provides that the Permit Board may consider "any information it deems relevant…." Miss. Code Ann. §49-17-29(3)(c). The Permit Board reads that language to mean that the Legislature authorizes the Permit Board to do whatever it wishes with respect to revocation of a permit.

But the Mississippi Supreme Court's opinion in *King* will not allow the administrative agency that sort of unfettered discretion, and the language in the statute provides no solace on the issue of the Permit Board's failure to act on an objective standard.

Relevance is an evidentiary standard; it speaks only to whether the Permit Board has considered "substantial evidence" to support its fact findings.

Conversely, relevance of evidence has nothing to do with whether the Permit Board's action is based upon an objective, pre-identified standard, whether "cause" has been defined for the public and for permittees. If the Permit Board had properly defined "cause" for purposes of revocation, then the statute merely says the Permit Board may consider relevant evidence for purposes of determining whether it has "cause" to terminate, in the same way that this Court, when sitting as a trier of fact at trial, considers relevant testimony to then determine whether a pre-set standard or other legal requirement has been satisfied or breached.

The statute says nothing more than that, and what it says is not enough to get the Permit Board where it needs to go.[4]

d. The Permit Board's regulations do not create an objective standard or definition of "cause."

To its credit, the Permit Board acknowledges in its conclusions of law that "[t]he regulations do not define cause for terminating state operating permits." R. MEQPB/GCC 91, ¶70. Then, however, the Permit Board embarks on a circuitous journey to try to explain why that doesn't matter. *Id.,* ¶71, MEQPB/GCC 92, ¶72.

[4] Of course, the statute cannot literally mean what the Permit Board says; the Permit Board may not, legally, deem just *any* evidence relevant. It could not, for example, deem it relevant for permitting purposes that an applicant is or is not owned by someone of a particular race or religion, or is of a particular ethnic origin. So the Permit Board's overly expansive misreading of the statute is quite properly subject to this Court's correction by virtue of the *King* case. "Interpreting statutes is reserved exclusively for courts." *HWCC-Tunica, Inc. v. Miss. Dep't of Revenue*, 296 So. 3d 668, 677 (Miss. 2020) (citing to *King*, 245 So. 3d at 407-08*).*

Rather than follow that trip around the world, a review of what the regulations *do* say is instructive.

In its Definitions section, the operative regulation lists 89 – eighty-nine! – different terms regarding the Permit Board's permitting functions. 11 Miss. Admin. Code Pt. 6, R. 1.1.1.A.

But what is not defined in the 89? The word "cause" is not defined.

In its Conditions section, the operative regulation publishes a policy that applies to all state operating permits: "The discharge of any wastewater from a facility operating under a State permit to waters of the state shall constitute a violation of the permit." 11 Miss. Admin. Code Pt. 6, R. 1.1.4.L.

But what does that regulation not state? It does not state that a discharge into state waters or any other permit violation is "cause" for revocation of the permit, language that would be simple to include and clear to understand if was ever the intention of the Government to act in a simple and clear manner.

e. The Permit Board's catch-all effort does not create an objective standard.

Apparently concerned that neither its belt nor its suspenders will suffice, the Permit Board throws in a catch-all provision for good measure, apparently hoping something in the mix can be transmogrified into a definition of "cause." In fact, the effort demonstrates even further the absence of any objective standard for revocation of the Permit.

"The above conclusions of law *individually and in the aggregate* constitute cause for revocation," asserts the Permit Board in its final ruling. R. MEQPB/GCC 94, ¶87 (emphasis added).

Well then.

The Permit Board tells this Court that it can pick any single one of the Permit Board's conclusions of law and that single conclusion, standing alone, will be "cause" for revocation.

There are seventeen (17) separate conclusions of law listed by the Permit Board before the catch-all language of ¶87. R. MEQPB/GCC 91 – 94.

Paragraphs 69, 70, 71 and 72 certainly cannot constitute "cause" for revocation, as those paragraphs merely set out the Permit Board's tortured effort in several different ways to define "cause" after the fact. Those conclusions certainly may not, individually or in the aggregate, constitute "cause" for revocation. R. MEQPB/GCC 91 – 92.

Paragraph 73 describes "unpermitted discharges at Brandon, Pelahatchie and Jackson," all subjects of notices of violation, as "cause" for revocation. R. MEQPB/GCC 92. Now that's an interesting proposition, since the Permit Board knew about those alleged discharges *before* the Permit was issued. R. MEQPB/GCC 71 – 72, 75, ¶¶15 – 17, 24. So now, according to the Permit Board, it is "cause" for revocation that Gold Coast was charged with violations by MDEQ *before* the Permit Board ever issued the Permit.

Paragraph 74 claims that it is "cause" for revocation that Gold Coast was cited for violating storm water provisions of a separate construction permit. R. MEQPB/GCC 92. But that alleged violation is on appeal to the Chancery Court of Hinds County, and in any event is a dispute over marginal items such as whether hay bales and wattles were properly placed to prevent storm water runoff during construction of the lagoon – the rough equivalent of a speeding ticket. Gold Coast believes it will ultimately prevail on its appeal of that item, but regardless, it is arbitrary and capricious to suggest that a minor violation such as that could, without prior notice, constitute "cause" for revocation of the separate state operating permit for the lagoon itself.

Paragraph 81 asserts that the Permit Board's conclusions of law are consistent with the Commission's Orders No. 7069 20 and 7074 20, and the Commission's final Order of November 19, 2020. R. MEQPB/GCC 93.

But no, the Permit Board's conclusions of law aren't consistent with those order, at all. The Commission's November 19, 2020 final Order expressly modified Orders no. 7069 20 and 7074 20 to allow Gold Coast to continue to conduct its business at the lagoon. Motion to Continue and Stay Evidentiary Hearing, Exhibit B, Transcript Excerpt from the November 19, 2020 Commission Hearing (reflecting the oral findings and rulings of the Commission), R. MEQPB/GCC 197 – 200.[5] The Permit Board's revocation of the Permit is not only inconsistent with the Commission's Order, it makes compliance with the Commission's Order impossible. Paragraph 81 certainly may not constitute "cause" for revocation.

So, the Permit Board's assertion in Paragraph 87 of its conclusions of law that each individual conclusion of law constitutes a separate "cause" for revocation is just wrong.

This "pick a card, any card!" approach to contriving a definition that doesn't exist demonstrates in yet another way that the Permit Board had no objective standard against which to measure its intent to revoke Gold Coast's Permit. By throwing so much against the wall in the hope that something will stick, the Permit Board shows the absence of any legal basis for its punitive action.

[5] At the time of the April 13, 2021 Permit Board hearing, the Commission had not yet entered written findings of fact and conclusions of law. The Commission issued Order 7112 21 on April 15, 2021. A true and accurate copy Order 7112 21 is attached as Exhibit "B" and incorporated by reference.

CONCLUSION

This Court's review of the administrative action before it calls for reversal on two, separate grounds: the agency acted unlawfully, and the agency acted without an objective standard, so arbitrarily and capriciously.

Arguments from the Government about "prejudice" and "sufficiency of the evidence" do not address the two key questions before the Court:

1) Did the Permit Board act contrary to statute?; and

2) Did the Permit Board act arbitrarily and capriciously?

If the answer to either question is "Yes," this Court should reverse.

Here, the answer to both questions is "Yes," and this Court should reverse.

Therefore, Appellant Gold Coast Commodities, Inc. requests that this Court enter an order reversing and rendering the November 10, 2020 and April 13, 2021 actions of the Permit Board, and restoring to full force and effect Gold Coast's State Operating Permit No. MSU218003, in order that Gold Coast may proceed to comply with the separate order of the Mississippi Commission on Environmental Quality as to the conditions of resuming lagoon operations.

Respectfully submitted, this the 21st day of September, 2021.

GOLD COAST COMMODITIES, INC.

BY: *s/ R. Andrew Taggart, Jr.*
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CERTIFICATE OF SERVICE

I, R. Andrew Taggart, Jr., hereby certify that on this day I electronically filed the foregoing pleading with the Clerk of the Court using the MEC system which sent notification of the filing to all counsel of record.

This the 21st day of September, 2021.

s/ R. Andrew Taggart, Jr.
R. ANDREW TAGGART, JR.