IN THE CHANCERY COURT OF RANKIN COUNTY, MISSISSIPPI

GOLD COAST COMMODITIES, INC. **APPELLANT**

VS. **CAUSE NO. 61CH1:21-cv-00717**

MISSISSIPPI ENVIRONMENTAL QUALITY PERMIT BOARD **APPELLEE**

ON APPEAL FROM THE MISSISSIPPI ENVIRONMENTAL QUALITY PERMIT BOARD

BRIEF FOR APPELLEE MISSISSIPPI ENVIRONMENTAL QUALITY PERMIT BOARD

Roy Furrh (MSB #4321)
Donna Hodges (MSB #9651)
Gretchen Zmitrovich (MSB # 101470)
Lisa Thompson Ouzts (MSB #9042)

Mississippi Department of
Environmental Quality
Post Office Box 2261
Jackson, Mississippi 39225

Attorneys for Appellee Mississippi Environmental Quality Permit Board

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

STATEMENT OF THE ISSUES

I. Does an Open Meetings Act violation—which the Mississippi Ethics Commission found was unintentional and did not warrant fines—bar the Mississippi Environmental Quality Permit Board from revoking a permit?

II. Did the Permit Board abuse its discretion in finding that Gold Coast's violations were cause for revoking Gold Coast's permit?

STATEMENT OF THE CASE

I. NATURE OF THE CASE

The Mississippi Environmental Quality Permit Board (Permit Board)[1] issued a state operating permit to Gold Coast Commodities, Inc. (Gold Coast), allowing it to construct and operate a wastewater treatment lagoon near Pelahatchie, Rankin County, Mississippi. The Permit Board revoked the state operating permit approximately fifteen months after issuing it. This is an appeal of the Permit Board's decision. Permit Board appeals are to the chancery court in the county which is the situs in whole or part of the subject matter of the hearing. Miss. Code Ann. § 49-17-29 (5)(b) (Supp. 2021). The lagoon is in Rankin County; thus, this Court has jurisdiction to consider the appeal. The Court sits solely as an appellate court with the authority to consider the Permit Board's decision "only upon the record as made before the Permit Board." *Id*. If the Court finds there was no prejudicial error, the Court must affirm the Permit Board's decision; if the Court finds prejudicial error, it must reverse "and remand the matter to the Permit Board for appropriate action as may be indicated or necessary under the circumstances." *Id*. A rebuttable presumption exists in favor of agency decisions. *Sierra Club v. Miss. Envtl. Quality Permit Bd.*, 943 So. 2d 673, 678 (¶ 11) (Miss. 2006).

[1] The Permit Board was created "for the purpose of issuing, reissuing, modifying, revoking or denying . . . permits to control or prevent the discharge of contaminants and wastes into the air and waters of the state . . . ." Miss. Code Ann. § 49-17-28 (1) (Rev. 2012).

II. COURSE OF PROCEEDINGS

On April 17, 2018, Gold Coast applied to the Mississippi Department of Environmental Quality (MDEQ)[2] for a state operating permit (Permit) to construct and operate an industrial wastewater treatment lagoon near Pelahatchie, Mississippi. RE. 2; R. MEQPB/GCC 0069 (¶2). On August 13, 2019, the Permit Board issued the Permit. *Id*. On September 11, 2020, MDEQ's Executive Director issued an *ex parte* order on behalf of the Mississippi Commission on Environmental Quality (Commission)[3] citing Gold Coast for violating the Permit and certain environmental laws and regulations. *Id.* at ¶ 5. On October 1, 2020, the Executive Director entered a second *ex parte* order requiring Gold Coast to remove and dispose of all the wastewater in the lagoon within sixty days. *Id.* Gold Coast requested a hearing before the Commission. *Id.*

On October 22, 2020, the Permit Board's Chair asked MDEQ to place the Permit on the Board's meeting agenda for discussion and consideration; the matter was placed on the Permit Board's November 10, 2020, agenda. *Id.* at ¶ 6. After hearing from MDEQ staff and Gold Coast's representatives at the November 10th meeting, the Permit Board unanimously voted to revoke the Permit. *Id*.

On November 19, 2020, the Commission held the hearing regarding the two *ex parte* orders. Id. at ¶ 7. The Commission modified the *ex parte* orders to allow Gold Coast to resume operations—contingent upon certain conditions—and penalized Gold Coast $505,000 for eleven

[2] MDEQ serves as staff of the Permit Board providing technical, legal, and administrative support. *Golden Triangle Regional Sold Waste Mgmt. Auth. v. Citizens Against the Location of the Landfill*, 722 So. 2d 648, 650 (¶ 10) (Miss. 1998).

[3] The Commission supervises and enforces the Mississippi Air and Water Pollution Control Law and the rules, regulations, and orders promulgated pursuant to the law. Miss. Code Ann. § 49-17-17 (a) (Rev. 2012). The Commission authorized the Executive Director to issue certain orders on the Commission's behalf. Miss. Code Ann. § 49-2-13(j) (Rev. 2012); 11 Miss. Admin. Code Pt. 1, R. 1.1.E.

violations. *Id.* Gold Coast appealed the Commission's decision to Hinds County Chancery Court. RE. 3; R. MEQPB/GCC 0070 (¶ 7).[4]

On December 9, 2020, Gold Coast requested a full evidentiary hearing before the Permit Board regarding the Permit revocation; the Permit Board held the hearing on April 13, 2021. RE. 2, 3; R. MEQPB/GCC 0069 (¶ 6), 0070 (¶9). The Permit remained in effect until the Permit Board made its final decision on April 13, 2021. *See* Miss. Code Ann. § 49-17-29 (3)(c). MDEQ submitted written prefiled testimony of five witnesses, and Gold Coast submitted written prefiled testimony of six witnesses. *Id.* The witnesses were present at the hearing, available for cross-examination by the parties, and for questioning by the Permit Board. *Id.* Gold Coast's counsel did not cross-examine any of MDEQ's witnesses. RE. 85, 87, 88, 91, 107; R. MEQPB/GCC 1339 (56:4–5), 1341 (58:8–9), 1342 (59:14–15), 1345 (62:9), 1361 (78:24–25). MDEQ subpoenaed Tom Douglas and Robert Douglas, Gold Coast's owners, to testify as adverse witnesses at the hearing; they each invoked their Fifth Amendment privilege against self-incrimination. RE. 4; R. MEQPB/GCC 0071 (¶ 13). After an all-day hearing at which the Permit Board heard testimony from MDEQ's and Gold Coast's witnesses, the Permit Board affirmed its November 10, 2020, decision to revoke Gold Coast's permit. RE. 27; R. MEQPB/GCC 0094 (¶ 87). The Permit Board acknowledged that the Commission would have allowed Gold Coast to resume operations under certain conditions. *Id.* Thus the Board stated Gold Coast could submit a new permit application to operate the lagoon incorporating provisions from the Commission's order, including hiring a professional lagoon manager and working with MDEQ to identify appropriate conditions for land applying the treated wastewater. *Id.* Gold Coast appealed the

[4] Commission appeals may be filed in the county where the hearing was held or in the county that is the situs of the subject matter of the hearing. Miss. Code Ann. § 49-17-41 (Rev. 2012). The Commission hearing was in Hinds County.

Permit Board's decision to Hinds County Chancery Court on April 16, 2021. R. MEQPB/GCC 0097–0098. The Hinds County Chancery Court transferred the appeal to the Rankin County Chancery Court because the situs of the subject matter of the hearing is Rankin County. (Dkt. # 14). This Honorable Court denied Gold Coast's Motion for Supersedeas on June 24, 2021, but set a deadline of July 30, 2021, for the Permit Board to certify and file the administrative record. (Dkt. # 26). The Permit Board adopted its Findings of Fact and Conclusions of Law supporting its decision on July 13, 2021, and certified and filed the administrative record on July 28, 2021. R. MEQPB/GCC 0068–0095; (Dkt. # 27).

III. STATEMENT OF THE FACTS

A. Introduction.

Gold Coast has blamed everyone except itself for the abysmal circumstances that caused the Permit Board to revoke its Permit for a wastewater treatment lagoon in Rankin County, Mississippi. However, the issues that led to the Permit Board revoking the Permit are directly related to Gold Coast's "business decision" to begin dumping its wastewater into the lagoon before installing the aerators needed to treat the wastewater and control odors and its failure to install equipment that could have prevented 418,000 gallons of wastewater from its lagoon from polluting the nearby Dry Creek. Gold Coast's "business decision" prompted it to dump its wastewater into the lagoon instead of storing the water in tanks at its business site for ***five months*** before it even ***ordered*** the aerators needed to treat the wastewater and control odors. Indeed, Gold Coast dumped 2,000,000 gallons of wastewater into its unaerated lagoon for eight months before it finally installed and activated the aerators. That "business decision" caused hydrogen sulfide (H_2S) gas to build up in the lagoon, and when Gold Coast finally activated the aerators, the released gas caused one person to pass out and three to go to the hospital. That

"business decision" created miserable conditions for its neighbors who were subjected to oppressive odors from the lagoon and plague-like levels of flies. And while the wastewater release was supposedly accidental, had Gold Coast installed the flow monitoring and automated shutdown equipment that it noted in its permit application, the release could have been avoided.

Now Gold Coast blames the Permit Board. It blames the Permit Board for "prejudging" Gold Coast because three Board members discussed Gold Coast's compliance issues via email and copied the entire Board. This led the Mississippi Ethics Commission to find that the Permit Board violated the Open Meetings Act; however, the Ethics Commission did not recommend a fine because the Board did not willfully and knowingly violate the Act. The Ethics Commission's finding does not justify voiding the Permit Board's decision to revoke the Permit, a decision it made during an open meeting and affirmed after a full evidentiary hearing—with a combined eleven sworn witnesses and legal argument from the parties—which was also an open meeting. Gold Coast also blames the Permit Board for making up its own subjective definition of "cause" for revocation in absence of an objective standard promulgated by the Commission. Gold Coast's insistence that the Commission was required to promulgate an objective standard for cause is based on its mistaken reading of forty-year-old case law. Gold Coast ignores that its own actions—its numerous violations, numerous unresolved odor complaints from its residential neighbors, a toxic gas release that sent people to the hospital, a wastewater release that polluted a nearby creek and killed fish, and plague-like levels of biting flies descending upon neighboring residents—caused the Permit Board to revoke the Permit. Even its own lawyer admitted at the evidentiary hearing that if the Permit Board based its decision on what happened in 2020, "we

lose."[5] RE. 72, 73–74, 74, 80, 292, 296; R. MEQPB/GCC 1326, 1327–1328, 1329, 1334, 1546, and 1550. The Permit Board agreed and revoked the Permit. RE. 27; R. MEQPB/GCC 0094 (¶ 85).

B. Facts.

Gold Coast manufactures and processes fats and oils used for the animal feed industry and turns oilseed soapstocks into marketable fatty acids at its facility in Brandon, Rankin County, Mississippi. RE. 4; R. MEQPB/GCC 0071 (¶15). Wastewater from these processes must be disposed of in an environmentally responsible manner. The Mississippi Department of Environmental Quality (MDEQ) issued a Notice of Violation (NOV) to Gold Coast in October 2016 for discharging its process wastewater into the City of Brandon's municipal collection system without a permit. RE. 4–5; R. MEQPB/GCC 0071–0072 (¶ 15). Gold Coast then disposed of its wastewater into the City of Pelahatchie's wastewater treatment lagoon, despite not having a permit to do so, until Pelahatchie terminated its arrangement with Gold Coast in November 2016. RE. 5; R. MEQPB/GCC 0072 (¶ 16). Gold Coast then hired Walker Environmental Services, Inc. d/b/a Rebel High Velocity Sewer Services to receive and dispose of its wastewater. *Id.* at ¶ 17. Walker dumped the wastewater into the City of Jackson's sewer system without the City's authorization. *Id.* In October 2017, the Mississippi Commission on Environmental Quality (Commission) ordered Gold Coast to stop sending its wastewater to Walker and to obtain MDEQ's written approval before discharging its wastewater at any

[5] Gold Coast's consultant Sam Hardin also admitted: "I certainly understand why the Permit Board issued the initial revocation of the permit. The odors from the treatment facility, in particular, were difficult to deal with and offensive to surrounding residents in the summer and fall of that year." R. MEQPB/GCC 4770.

Mississippi facility.[6] *Id.* Gold Coast then began shipping its wastewater to it sister facility in Chattanooga, Tennessee. RE. 1, 5; R. MEQPB/GCC 0068 (¶ 1), 0072 (¶ 19). Gold Coast applied for the Permit on April 17, 2018, to allow it to construct and operate its own wastewater treatment lagoon and land apply the treated wastewater. RE. 2; R. MEQPB/GCC 0069 (¶ 2).

On August 13, 2019, MDEQ presented the draft Permit to the Permit Board at Gold Coast's request. RE. 8; R. MEQPB/GCC 0075 (¶ 24). The director of MDEQ's Environmental Permits Division informed the Permit Board that MDEQ had three open enforcement actions pending against Gold Coast, and the Commission had prohibited Gold Coast from disposing its wastewater in Mississippi without MDEQ's written approval. *Id.* She further advised the Board that EPA's Criminal Investigation Division was investigating Gold Coast and that the City of Brandon had sued Gold Coast for damaging its sewer system. *Id.*

The Permit Board questioned Gold Coast's compliance history and the pending enforcement actions. One member asked whether the Board could withhold a permit based on that history. RE. 314; R. MEQPB/GCC 1720 (11:9–13). Another asked whether issuing the Permit would help Gold Coast avoid future violations. RE.316; R. MEQPB/GCC 1722 (13:9–11). The Permit Board questioned whether Gold Coast was making an effort to become a better operator. RE. 318; R. MEQPB/GCC 1724 (15:6–8). It also asked what the legal repercussions would be if the Board delayed the vote until the legal proceedings and investigations were

[6] MDEQ issued an NOV to Gold Coast for the unpermitted discharges into the Cities of Brandon's, Pelahatchie's, and Jackson's sewer systems; the NOV has not been resolved. RE. 5; R. MEQPB/GCC 0072 (¶ 18). Walker pleaded guilty in federal court to conspiring to discharge untreated waste into Jackson's system. MEQPB/GCC 0072 n. 5. While there is a pending federal criminal investigation related to those unpermitted discharges, neither Gold Coast, nor Tom Douglas, nor Robert Douglas (respectively Gold Coast's president and vice president) had been charged at the time of the hearing, *Id.*, and upon information and belief, no criminal indictment has been issued and no criminal information has been filed as of this date. MDEQ does not typically prosecute NOVs when federal criminal actions are proceeding. *Id.* at n. 6.

finalized. RE. 321; R. MEQPB/GCC 1727 (18:16–20). Another Permit Board member asked what it would take to revoke the Permit if the Board issued it. RE. 323; R. MEQPB/GCC 1729 (20:23–21:3). The Permit Board's Chair questioned whether MDEQ staff could inspect more often than they typically would if the Board issued the Permit. RE. 324; R. MEQPB/GCC 1730(21:16–22:8). Chair Wittmann specifically stated:

> [I]f the permit was issued, could there be more, and I know that, you know, staff is already busy and stretched thin, but if there have been a – if there's been a history of a compliance issue, would there be more -- the ability to have more compliance inspections at the site, either regular or 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 this is approved, that [they] 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.

RE. 324–325; R. 1730–1731 (21:16–22:7) (emphasis added). The Permit Board was concerned about issuing a Permit to Gold Coast in light of its compliance history, and its reluctance was overcome by the knowledge that MDEQ committed to inspecting Gold Coast more frequently and that it could revoke the Permit if Gold Coast failed to comply. Gold Coast was on notice that the Permit Board would consider revocation if there were ongoing compliance issues. The Permit Board issued the Permit on August 13, 2019.[7] RE. 8; R. MEQPB/GCC 0075 (¶ 25). By issuing the Permit, the Board provided Gold Coast an opportunity to demonstrate that it could operate responsibly and comply with the Permit and with environmental laws and regulations; Gold Coast failed miserably.

[7] Four of the seven Permit Board members voted to issue the Permit on August 13, 2019, one voted not to issue the Permit, and two abstained from voting. RE. 8; R. MEQPB/GCC 0075 (¶ 25).

About two months after the Permit Board issued the Permit, MDEQ cited Gold Coast for violating the Mississippi Small Construction Storm Water General Permit (SWPPP). RE. 9; R. MEQPB/GCC 0076 (¶ 26). This permit authorizes storm water discharges from construction activities for projects from one to less than five acres.[8] The permit requires facilities to implement a site-specific Storm Water Pollution Prevention Plan in which the facility describes the controls it will use to retain sediment from construction activities onsite and to minimize pollutant discharge.[9] MDEQ found that Gold Coast had not installed silt fencing in several areas, had improperly installed some of the stormwater controls, and otherwise had failed to install controls identified in its SWPPP. RE. 9; R. MEQPB/GCC 0076 (¶ 26). The Commission cited Gold Coast for the stormwater permit violations on October 15, 2019. *Id.*

The City of Chattanooga stopped accepting Gold Coast's wastewater in October 2019. RE. 2; R. MEQPB/GCC 0069 (¶ 3). Gold Coast began discharging its wastewater into the lagoon about one month later even though it had not installed the equipment (aerators) to treat the wastewater and control odors. RE. 5; R. MEQPB/GCC 0072 (¶ 19). Gold Coast's consultant testified that Gold Coast had a significant amount of wastewater stored at its Brandon facility and needed to move it offsite. RE. 10; MEQPB/GCC 0077 (¶ 28). Tommy Douglas with Gold Coast testified that it was a "business decision" to begin using the unaerated lagoon rather than to store the wastewater in tanks at its Brandon facility. RE. 5–6; R. MEQPB/GCC 0072–0073. (¶ 19). There was adequate water in the lagoon to install and operate the aerators without damaging the lagoon by December 2019 or January 2020. RE. 9–10; R. MEQPB/GCC 0076–0077 (¶ 27). Nevertheless, Gold Coast dumped its wastewater into the lagoon for ***five months*** before it even ***ordered*** the aerators. RE. 11; R. MEQPB/GCC 0078 (¶ 32). While Gold Coast said it believed

[8] https://www.mdeq.ms.gov/wp-content/uploads/2013/04/Small_cnstr_prmt.pdf Condition T-1 (p. 5).
[9] https://www.mdeq.ms.gov/wp-content/uploads/2013/04/Small_cnstr_prmt.pdf,Condition S-1 (p. 8).

that it would not violate the Permit if it used the lagoon without aerators, it knew as early as November 2018 that the lagoon would produce odors without adequate aeration. RE. 15; R. MEQPB/GCC 0082 (¶ 46). Nevertheless, Gold Coast dumped 2,000,000 gallons of wastewater into the lagoon from November 2019 to July 2020—eight months!—before finally activating the aerators. RE. 26; R. MEQPB/GCC 0093 (¶ 77).

As a result, Gold Coast's neighbors were subjected to nauseating odors and biting flies. One of Gold Coast's neighbors testified on Gold Coast's behalf at the hearing; even he testified that the odors were offensive beginning in February or March 2020. RE. 13; R. MEQPB/GCC 0080 (¶ 38). MDEQ witness Laine Stubbs's father lives approximately a quarter of a mile from the lagoon. RE. 13; R. MEQPB/GCC 0080 (¶42). She testified that she began smelling odors beginning in November 2019, and the odors became much worse in the spring. RE. 13–14; R. MEQPB/GCC 0080–0081 (¶ 42). She testified that the flies were "extremely bad" and impossible to keep out of her father's house, and these conditions worsened during the summer. *Id.* People began submitting odor complaints to MDEQ in May 2020, and the complaints continued through November 2020. RE. 13, 15; R. MEQPB/GCC 0080 (¶ 39); MEQPB/GCC 0082 (¶ 46). On several occasions, MDEQ staff verified that there were strong odors at the lagoon. RE. 13; R. MEQPB/GCC 0080 (¶¶ 39–41); RE. 14; R. MEQPB/GCC 0081 (¶ 43). MDEQ "noted strong, pungent nuisance-level odors and above average amount of flies" at a neighbor's house that was three quarters of a mile from the lagoon. RE. 14; R. MEQPB/GCC 0081 (¶ 43). At another visit, after Gold Coast's consultant stated that odors had been "drastically mitigated" and that they had observed "major improvements" with the flies, MDEQ found "prominent odors" and "plague-like levels of flies" downwind of the lagoon. *Id.*

Gold Coast knew that the aerators were needed to control odors. RE. 15; R. MEQPB/GCC 0082 (¶ 46). One of Gold Coast's representatives told the Permit Board that Gold Coast began discharging to the lagoon in anticipation of the aerators being delivered, but the aerators were delayed for several months because of the pandemic. RE. 10; R. MEQPB/GCC 0077 (¶ 29). Gold Coast's representatives had collective amnesia regarding when they ordered the aerators and when they knew the aerators were delayed. *See*; RE. 10; R. MEQPB/GCC 0077 (¶ 30) (in responding to questions during the Commission hearing, neither Gold Coast's consultant nor Gold Coast's designated corporate representative Tommy Douglas could recall when the aerators were ordered); (Gold Coast's attorney told the Permit Board that Gold Coast "became aware that the aerators were delayed when they were not delivered on time, and they kept getting promises that the aerators were on the way.")

MDEQ subpoenaed documents that revealed that Gold Coast ***did not even order*** the aerators until April 2020 ***five months*** after it started dumping wastewater into the lagoon. RE. 11; R. MEQPB/GCC 0078 (¶ 32). Other documents revealed that the delays in installing a control panel necessary to operate the aerators and irrigation equipment were due to their consultant "running behind" on ordering. RE. 11; R. MEQPB/GCC 0078 (¶ 33). Gold Coast knew aerators were the key to controlling odors. RE. 15; R. MEQPB/GCC 0082 (¶ 46). Nevertheless, it continued to dump its smelly wastewater into the lagoon before it finally ordered, installed, and activated the aerators. Unamused by Gold Coast's "demonstrably false" misrepresentations regarding the delays, the Permit Board considered the misrepresentations to be cause for revocation. RE. 26; R. MEQPB/GCC 0093 (¶ 82).

The lagoon was close to capacity when Gold Coast finally activated the aerators on July 20, 2020. RE. 15; R. MEQPB/GCC 0082 (¶ 47). Indeed, Gold Coast had dumped 2,000,000

gallons of wastewater into the lagoon over an eight-month period when it finally activated the aerators. RE. 26; R. MEQPB/GCC 0093 (¶ 77). Hydrogen sulfide gas had built up over that eight-month period and was released when Gold Coast turned the aerators on; this caused people to pass out and three people that to be transported to the hospital. RE. 15–16; R. MEQPB/GCC 0082–0083 (¶ 47). The Permit Board found the "endangerment to human health caused by the H_2S release, which was caused by Gold Coast's discharges in the lagoon for eight months without aeration" constituted cause for revocation. RE. 26; R. MEQPB/GCC 0093 (¶ 83).

A little over a month after the gas release, in August 2020, an electrical contractor working at the site inadvertently turned the land application system on and then left the site according to Gold Coast.[10] RE. 17; R. MEQPB/GCC 0084 (¶ 50). The system ran unnoticed for twenty-four hours. RE. 16; R. MEQPB/GCC 0083 (¶ 48). The land application fields were saturated, and wastewater from the lagoon ran off into the nearby Dry Creek. *Id.* Gold Coast reported the release to the Mississippi Emergency Management Agency but it did not report the release to MDEQ as its Permit required. RE. 16–17; R. MEQPB/GCC 0083–0084 (¶ 48). While Gold Coast blamed the release on its electrical contractor, had it installed flow monitoring and automated shutoff system as indicated in its permit application, the release likely would not have occurred. RE. 17; R. MEQPB/GCC 0083 (¶ 50). MDEQ issued a water contact advisory for Dry Creek; the advisory was still in effect as of the evidentiary hearing date. RE. 26–27; MEQPB/GCC 0093–0094 (¶ 84). The Board considered the endangerment to the environment as cause for revocation. *Id.*

[10] The Permit allowed Gold Coast to land apply its treated wastewater. RE. 6; R. MEQPB/GCC 0073 (¶ 20).

SUMMARY OF THE ARGUMENT

The Mississippi Ethics Commission found that while the Permit Board violated the Open Meetings Act by discussing Gold Coast via email, the violation was not willful or knowing. The Permit Board took no action during the email communication, and the law does not support Gold Coast's suggestion that the Permit Board is somehow enjoined from revoking the permit. Further, the Mississippi Commission on Environmental Quality was not required to promulgate an objective definition for cause. The Permit Board has broad statutory authority to make permitting decisions "based upon any information as it deems relevant . . . under any conditions as it deems necessary that are consistent with the commission's regulations." Miss. Code Ann. § 49-17-29 (3)(c). In absence of a regulatory definition for "cause" for revoking state permits, the Permit Board considered what would constitute cause for terminating a discharge permit and what it would consider when deciding whether to initially issue a permit. An action is arbitrary or capricious "if the agency entirely failed to consider an important aspect of the problem, or offered an explanation for its decision that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Sierra Club*, 943 So. 2d at 678 (¶ 11). The evidence supports the Permit Board's decision, and it is difficult to understand how Gold Coast could be confused about what would constitute cause for revocation when the Permit Board discussed what it would consider cause when it issued the Permit on August 13, 2019.

ARGUMENT

I. STANDARD OF REVIEW

Appeals from the Permit Board are to be considered only upon the record made before the Board. Miss. Code Ann. § 49-17-29 (5)(b). If the reviewing Court finds prejudicial error, it

may reverse the decision and remand the matter to the Permit Board for appropriate action. *Id*. If the Court finds there was no prejudicial error, it must affirm the Permit Board's decision. *Id*.

"[A]n agency's decision will not be disturbed on appeal absent a finding that it (1) was not supported by substantial evidence, (2) was arbitrary and capricious, (3) was beyond the power of the administrative agency to make, or (4) violated some statutory or constitutional right of the complaining party." *Sierra Club*, 943 So. 2d at 678 (¶ 10) (*citing McDerment v. Miss. Real Estate Comm'n*, 748 So. 2d 114, 118 (Miss. 1999). "Substantial evidence is 'something less than a preponderance of the evidence but more than a scintilla or glimmer. The reviewing court is concerned only with the reasonableness of the administrative order, not its correctness.'" *Id*. at ¶ 11 (*citing Miss. Dep't of Envtl. Quality v. Weems*, 653 So. 2d 266, 280-81 (Miss. 1995)). An action will be considered arbitrary or capricious "if the agency entirely failed to consider an important aspect of the problem, or offered an explanation for its decision that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id*. A rebuttable presumption of validity attaches to the determinations of an administrative agency; the burden of proving invalidity, and of rebutting the presumption, is on the appellant. *Miss. Comm'n on Envtl. Quality v. Chickasaw County Bd. of Supervisors*, 621 So. 2d 1211, 1216 (Miss. 1993). Courts may not make administrative decisions and perform an administrative agency's functions; "[a]dministrative agencies must perform the functions required of them by law. *Miss. State Tax Comm'n v. Miss. Ala. State Fair*, 222 So. 2d 664, 665 (Miss. 1969). Further, the reviewing court "may not substitute its own judgment for that of the agency." *Sierra Club*, 943 So. 2d at 678 (¶ 11). An administrative appeal is not a means to have a court re-weigh evidence and reach a different conclusion. *Id.* at 677 (¶ 10).

In the present case, the Permit Board exercised its statutory authority by revoking Gold Coast's state operating permit. The Permit Board considered testimony, documentary evidence, and legal arguments presented by all the parties and entered twenty-eight pages of detailed findings of fact and conclusions of law and supported its findings and conclusions with substantial evidence. RE.1–28; R. MEQPB 0068–0095. While appellate courts no longer defer to an agency's interpretation of the statutes and regulations under which the agency operates,[11] agency decisions are still presumed to be valid and may not be reversed unless they are arbitrary and capricious, not based on substantial evidence, not within the agency's authority to make, or violate a statutory or constitutional right. The Permit Board is not asking this Court to defer to its interpretation of statutes or regulations; instead, it is asking this Court to recognize that agency decisions are still presumed valid, and Gold Coast has not rebutted the presumption of validity. This Court should affirm the Board's reasonable decision.

II. ARGUMENT

A. The Permit Board revoked the Permit during an open meeting at which Gold Coast representatives fully participated and then held a full evidentiary hearing, another open meeting, to reconsider the matter.

1. The Court does not have authority to void or nullify a decision made during an open meeting.

Gold Coast invites this Court to judicially notice a Final Order that the Mississippi Ethics Commission (Ethics Commission) entered that is not part of the administrative record. Appeals from Permit Board decisions "shall be considered only upon the record as made before the

[11] See *King v. Military Department*, 245 So. 3d 404 (Miss. 2018) (court no longer defers to an agency's interpretation of the statutes under which it operates); *Miss. Methodist Hosp. & Rehab. Ctr., Inc. v. Miss. Div. of Medicaid*, 2021 LEXIS 150, *11 (¶ 18); 2021 WL 23493 (Miss. 2021) (court no longer defers to an agency's interpretation of the rules and regulations under which it operates).

Permit Board." Miss. Code Ann. § 49-17-29 (5)(b). The order is not part of the record made before the Permit Board and should not be considered on appeal.

If the Court considers the order, the Permit Board notes that the Ethics Commission is charged with enforcing the Open Meetings Act. Miss. Code Ann. § 25-41-15 (Rev. 2018). If it finds a violation, it "may order the public body to take whatever reasonable measures necessary, if any, to comply." Miss. Code Ann. § 25-41-15. It may also impose civil penalties for willful or knowing violations and award reasonable expenses to the person who brings a complaint to enforce the Act. *Id.* The Ethics Commission found the Permit Board did not willfully or knowingly violate the Act, and it noted this was the first time the Ethics Commission had found the Board to have violated the Act. Exhibit A at 6. Thus, the Ethics Commission ordered the Board to refrain from further violations, to strictly comply with the Act, and to refrain from using email to circumvent the Act. *Id.* at p. 7. These were reasonable measures with which the Permit Board has complied. Neither Gold Coast nor the Permit Board appealed the decision.

Gold Coast argues that the Permit Board violated its statutory rights by violating the Open Meetings Act and that this justifies reversal of a decision made in subsequent open meetings. However, the Open Meetings Act does not recognize voidance of an agency's decision as a remedy for violations. Indeed, the Mississippi Legislature chose not to consider a proposed amendment to the Open Meetings Act that would have allowed a court to void any action taken by a public body in violation of the Open Meetings Act. H.B. 179, Reg. Sess. (Miss. 2021). And Mississippi courts have not voided actions taken by public bodies which violated the Open Meetings Act. In *Shipman v. North Panola Consol. Sch. District*, the Mississippi Supreme Court held that noncompliance with meeting notice requirements, which violated the Open Meetings Act, may subject the board to an injunction or mandamus petition but did not nullify the actions

the board took at the meeting. *Shipman v. North Panola Consol. Sch. District*, 641 So. 2d 1106, 1116 (Miss. 1994).

In *Mayor v. City Council & Columbus v. Commercial Dispatch*, the Mississippi Supreme Court found that the city council and mayor of Columbus deliberately held a series of prearranged, sub-quorum meetings to avoid deliberating retail development and renovations of a public building in an open meeting. *Mayor v. City Council & Columbus v. Commercial Dispatch*, 234 So. 3d 1236, 1240–1241 (¶ 18) (Miss. 2017). The mayor and city council made decisions in these nonpublic meetings and issued press releases regarding their decisions. *Id.* The court affirmed the Ethics Commission's Final Order to "'refrain from further violations' and 'comply strictly with the Act.'" *Id.* at 1238, 1241 (¶¶ 7, 24).[12]

In *Burleson v. Hancock County Sheriff's Dep't Civ. Serv. Comm'n*, the Mississippi Court of Appeals recognized that the Mississippi Supreme Court has required only substantial compliance, not nullification, of actions taken which did not strictly comply with the Open Meetings Act. *Burleson v. Hancock County Sheriff's Dep't Civ. Serv. Comm'n*, 872 So. 2d 43, 50 (¶ 27) (Miss. Ct. App. 2003). In *Hinds Cty. Republican Party v. Hinds Cty, Mississippi*, the United States District Court for the Southern District of Mississippi found the Hinds County Board of Supervisors violated the Open Meetings Act by deliberating during a meeting recess. *Hinds Cty. Republican Party v. Hinds Cty, Mississippi*, 432 F. Supp. 3d 684, 701 (S.D. Miss. 2020). The court stated that "the Mississippi Supreme Court has held that a violation of the Open Meetings Act 'may subject a board to an injunction or writ of mandamus,' but does 'not void the actions' of the board taken at the meeting. *Id.* at 703. The court also found the Open Meetings

[12]It does not appear that the complainant in the *Columbus* matter requested that the City's decisions be voided; however, the case is enlightening because it seems to recognize that voidance was not considered an option even for deliberate violations.

Act provided for civil penalties; thus, the court fined the board of supervisors $100 and ordered it to pay reasonable expenses. *Id.*

In *Esperanza Peace & Justice Ctr. v. City of San Antonio*, the US District Court for the Western District of Texas found that the City of San Antonio violated the Texas Open Meetings Act which, like the Mississippi Act, requires meetings of a government body to be open to the public unless otherwise provided. *Esperanza Peace & Justice Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433 (W.D. Tex. 2001). The city council in that case had held a series of nonpublic meetings between the mayor and council members, which were just shy of the quorum requirement, to discuss a controversial budget matter. *Id.* at 471. The council members and the mayor then signed a nonbinding consensus memorandum, and they voted without deliberation to approve the budget in a public meeting held the following day. *Id.* The court ruled that the city council could not ratify a decision made in nonpublic meetings in a subsequent public meeting. *Id.* at 478. However, "[w]hile actions committed in violation of the [Open Meetings] Act may not later be ratified, the same action may be taken in a properly convened meeting." *Id.* The court found to hold otherwise would allow a government body to "'rubber stamp' deliberations and decisions already made in violation of the Act." *Id.* Further, it would eviscerate the Act's goal "of ensuring the public's right to know what decision government officials make and to have those officials articulate fully the basis on which they act." *Id.*

Unlike the city council in *Esperanza*, the Permit Board did not take any actions during its email communications decisions in its email exchange; thus, there was no decision to ratify or "rubber stamp." The Permit Board emails occurred on September 29 and October 6, 2020. The Permit Board revoked the Permit on November 10, 2020, after deliberating the matter in an open meeting at which Gold Coast's representatives participated and fully articulated the basis for its

decision. RE. 359–360; R. MEQPB 0028–0030. Thereafter, on April 13, 2021, the Permit Board held a separate *de novo* all-day full evidentiary hearing pursuant to Miss. Code Ann. § 49-17-29 (4)(b) and 11 Miss. Admin. Code Pt. 1, Ch. 6. At the hearing, the Permit Board considered testimony from numerous witnesses—including six Gold Coast witnesses—documents, and legal arguments from counsel and fully articulated the basis for its decision in its Findings of Fact and Conclusions of Law.[13] While a case from a Texas court is not binding authority in Mississippi, the Court may find it helpful to consider how other courts have construed Open Meetings Act issues.

2. Denying motions does not warrant reversal on appeal.

Gold Coast claims that by refusing to continue the November 10, 2020, meeting to consider the Permit, the Permit Board demonstrated that it prejudged the matter and this requires reversal of the Board's decision. However, Gold Coast had legal counsel available at the meeting who stated he "anticipated the Board may deny the motion and that he was prepared to address the Permit Board if the Board should so deny." RE. 359; R. MEQPB/GCC 0028. This was the same legal counsel who appeared on Gold Coast's behalf at the August 13, 2019, Permit Board meeting where the Board first considered, and issued, the Permit. RE. 313; R. MEQPB/GCC 1719 (10:4). Gold Coast was capably represented by legal counsel familiar with the matter who stated he was ready to proceed.[14]

Gold Coast also claims the Permit Board demonstrated prejudice by denying Gold Coast's motion for alternative hearing procedures. [Dkt. # 30, p. 7]. Gold Coast had specifically

[13] The Permit Board member whom Gold Coast accused of "outright bias" did not attend the hearing, and the member designated in his place abstained from voting. RE. 4; R. MEQPB/GCC 0071 (¶ 12).
[14] He also represented one of Gold Coast's owners whom MDEQ subpoenaed to testify at the April 13, 2021, hearing.

moved the Permit Board to consider the matter on the written pleadings in lieu of live testimony.[15] If the Permit Board had additional questions, Gold Coast's counsel proposed that either Gold Coast's or MDEQ's legal counsel would answer the questions by directing the Board to the prefiled testimony, or tender the appropriate witness to answer the questions on the following day. *Id.* The Permit Board asked Gold Coast whether it would have a representative available to answer general questions on the day of the hearing if the Board approved the alternate procedures. Gold Coast's counsel answered "no." *Id.* It is difficult to understand how Gold Coast was prejudiced by the Permit Board's decision to hold the evidentiary hearing considering its concern that it may have had questions that would go unanswered on the day of the hearing if Gold Coast did not have a representative available. Had the Permit Board prejudged the matter, accepting Gold Coast's alternate procedures would have been a perfect opportunity for the Board to decide the matter without sitting through an all-day hearing.

Gold Coast also asserts that the outcome was predetermined because the Permit Board denied its motion to continue the April 13, 2021, full evidentiary hearing. (Dkt. # 30, p. 8). Gold Coast initially requested a continuance to allow its appeal of the *Commission* decision to be exhausted. R. MEQPB/GCC 0171. The Commission and the Permit Board are separate administrative bodies with separate roles. The Commission develops, implements, and enforces Mississippi environmental policy. *Golden Triangle*, 722 So. 2d at 650 (¶ 11). It promulgates environmental regulations setting the requirements applicants must meet to obtain a permit from the Permit Board. *Id.* The Permit Board, which "has more limited and specific authority than the Commission," is the "exclusive administrative body which issues or denies permits . . . ." *Id*. at ¶ 12. *See also* Miss. Code Ann. § 49-17-29 (3)(a) (Permit Board is the exclusive administrative

[15] https://www.mdeq.ms.gov/wp-content/uploads/2021/05/Signed-Minutes-of-the-April-6-2021-Special-Meeting-of-the-Permit-Board.pdf.

body to decide permit issuance, reissuance, denial, modification, or revocation). Because the Permit Board is the exclusive agency to make permitting decisions, the Board's decision was not dependent on the outcome of the Commission appeal. Delaying the hearing pending the appeal's outcome made no sense. Gold Coast supplemented its continuance motion based on its discovery of the emails between three of the Permit Board members. MEQPB/GCC 0957. It is unclear why Gold Coast's discovery of the emails would warrant continuing the hearing because, as discussed above, the Open Meetings Act (Miss. Code Ann. §§ 25-41-1, *et seq.*) does not prohibit the Permit Board from acting in subsequent open meetings.

Finally, Gold Coast claims it was prejudiced by the Permit Board's refusal to rescind its November 10, 2020, decision to revoke the Permit. Gold Coast had initially argued that one of MDEQ's lawyers should be disqualified from serving as legal counsel at the hearing because of remarks she had made at the Board's November 10, 2020, meeting. Gold Coast amended that motion three times; all three amendments concerned the email colloquy between three Permit Board members. RE. 4; R. MEQPB/GCC 0071 (¶12). Gold Coast claimed the Permit Board could not conduct a fair hearing based on the emails. *Id.* The Permit Board pointed out in its final decision that "[o]ne Permit Board member—whom Gold Coast accused of demonstrating 'outright bias'—attended and participated in the November 10, 2020, meeting when the Board revoked Gold Coast's permit, but he did not attend the subsequent evidentiary hearing held on April 13, 2021. The Permit Board member who was designated in his place abstained from voting at the evidentiary hearing." *Id.* Four of the Permit Board members did not participate in the email exchanges on September 29 and October 6, 2020, and all four of these members voted to revoke Gold Coast's permit at the November 10, 2020, meeting and again after the April 13, 2021, full evidentiary hearing. In other words, even not considering the votes of the three Permit

Board members who participated in the email exchange, a majority of the Board voted, twice, to revoke Gold Coast's Permit. The Permit Board carefully considered this matter, and to accuse every Permit Board member—even those who did not contribute to the email discussion—of being incapable of being fair is insulting.[16] Further, the point of the evidentiary hearing was for the Permit Board to determine whether it should reverse its revocation decision; it is hardly proof of prejudice that the Permit Board wanted to make this decision after a full hearing.

B. If Gold Coast's actions are not cause to revoke a permit, nothing is.

The Permit Board provided Gold Coast with an opportunity to demonstrate that it could responsibly operate a wastewater treatment lagoon to treat its own wastewater. Gold Coast was shipping its wastewater out of state, a condition that it asserted would drive it out of business. R. MEQPB/GCC 1451 (168:24–170:4). Instead of operating as a good citizen by installing equipment needed to treat the wastewater and control odors, Gold Coast began dumping its wastewater into the unfinished lagoon soon after the Permit was issued. RE. 9; R. MEQPB/GCC 0076 (¶ 27). This was a business decision, as Gold Coast's representative Tommy Douglas candidly admitted, one that created the conditions that burdened their residential neighbors with oppressive odors and biting flies, caused a person to pass out and three to go to the hospital, and polluted state waters with wastewater from the lagoon. The Commission fined Gold Coast for eleven violations of the Permit and environmental laws and regulations. RE. 2; R. MEQPB/GCC 0069 (¶ 7). Yet somehow the Permit Board—the agency with the exclusive statutory authority to revoke environmental permits based on any information it deems relevant under any conditions it

[16] Only one of the three Board members who exchanged the email voted at the hearing. The Permit Board Chair only votes to break ties; thus, Chair Wittmann did not vote.

deems necessary—should be forbidden from revoking the Permit for lack of an objective standard or definition of cause. This argument is creative; it also has no merit.

1. The Commission was not required to promulgate an objective standard or definition of cause.

Gold Coast argues that the Commission was required to promulgate an objective standard or definition of "cause" and that because it did not do so the Permit Board may not revoke its state operating permit. (Dkt. #30, p. 9) (*citing Mississippi Air & Water Pollution Control Permit Bd. v. Pets & Such Foods, Inc.* 394 So. 2d 1353 (Miss. 1981)). In *Pets & Such*, the Permit Board revoked an operating license because the facility failed to correct odors. *Id.* at 1354. The facility initially requested an evidentiary hearing before the Permit Board; however, the facility applied to chancery court for a temporary injunction to stop the administrative proceeding. *Id.* The court then permanently enjoined the Permit Board from proceeding against the facility. The case involved Miss. Code Ann. § 49-17-19 (Rev. 2012), which allows the Commission to set ambient air and water quality standards.[17] *Id.* The Commission had not set an ambient air standard for odor; indeed, the only guideline relating to odors was found in the Commission's air quality regulations which prohibited emission of toxic, noxious, or deleterious substances." *Id.* These regulations did not mention the word odor or authorize the Permit Board to revoke a permit based on odors. The Permit Board argued the facility should have first exhausted its administrative remedies. *Id.* at 1355. However, the court ruled that the doctrine of exhaustion of administrative remedies does not apply to cases in which no definitive standards have been set. *Id.* The court stated "[i]n delegating powers to the Commission, the legislature prescribed the rule for their guidance in Section 49-17-19. This section established the broad guidelines from

[17] The court quoted Miss. Code Ann. § 49-17-19 but mistakenly attributed the citation to Miss. Code Ann. § 49-17-29. *Pets & Such*, 394 So. 2d at 1354.

which the Commission should have established definitive standards." *Id.* Because the Commission did not set a definitive odor standard, the court found the facility was entitled to an injunction. *Id.*

A year after the *Pets & Such* decision, the Mississippi Legislature amended Miss. Code Ann. § 49-17-19 to include the following language: "'[i]n establishing ambient air quality standards for odor, the commission shall adopt recognized objective standards if they exist. In the absence of a recognized objective ambient air quality standard for odor, the commission may adopt such *subjective* standards as may be appropriate.'" *Sierra Club,* 943 So. 2d at 678 (¶ 14) (*citing* Miss. Code Ann. § 49-17-19) (emphasis added). Thus, the legislature acknowledged that if there was not an objective standard, it could adopt an appropriate subjective standard. By the time the court considered the *Sierra Club* case, however, the Commission had promulgated an objective standard for odor by adding "three reasonably measurable parameters." *Id.* at 679 (¶ 15). Even the court recognized that these standards were "relatively" objective. *Id.* at 680 (¶ 19).

The *Pets & Such* and *Sierra Club* decisions construed a statute that authorized the Commission to set ambient air and water quality standards. The *Pets & Such* case does not require the Commission to promulgate objective definitions of every term used in the permitting regulations at issue in this matter. Also, unlike the situation in *Pets & Such* where the regulations did not mention the word "odor," much less authorize revocation of a permit based on odors, the Commission specifically authorized the Permit Board to revoke state permits for cause. 11 Miss. Admin. Code Pt. 6, R. 1.1.5.A(3) and C(5).

In *Miss. Comm'n on Envtl. Quality v. Desai*, a gas station owner appealed a Commission decision that he had not made a good-faith effort to comply with the Underground Storage Tank (UST) Act because the regulations did not define "good faith." *Miss. Comm'n on Envtl. Quality*

v. Desai, 868 So. 2d 381, 386 (¶ 22). (Miss. Ct. App. 2004). The regulation required owners to perform leak detection monitoring, and the owner had not performed this monitoring for the four years that he operated the station. *Id.* at 385 (¶ 19). The UST Act allowed the Commission to determine whether a UST owner had substantially complied with the UST regulations. *Id.* at 384 (¶ 15). If the Commission so found, it would reimburse a UST owner for costs incurred in cleaning up a petroleum release. *Id.* Substantial compliance requires the owner to register the UST with MDEQ and to make a good-faith effort to comply with the UST Act and the rules and regulations. *Id.* In *Desai*, the Commission found that the duration of noncompliance was significant and therefore the owner "did not exhibit a good faith effort to comply with the regulations." *Id.* at 385 (¶19). The court rejected the owner's argument that the Commission could refuse to reimburse him for cleanup costs based on a lack of good faith compliance when the term "good faith" had not been defined. *Id.* at 387 (¶ 30). The court stated the term "good faith" is commonly used and like many terms of general reference some statutes may specifically define the term and some may not. *Id.* at 386 (¶26). The court considered different definitions of "good faith" in other areas of jurisprudence. *Id.* at 386–387 (¶ 28). The court rejected the owner's "contention that the Commission was in error because it had failed to define 'good faith,' pursuant to the Mississippi Administrative Procedures Act." *Id.* at 387 (¶ 30). The court found that under any of the definitions of "good faith" it cited, there was substantial evidence supporting the Commissions finding that the owner did not make a good faith effort to comply with the UST Act and regulations. *Id.* The court found that the Mississippi Legislature granted the Commission authority to make such determinations on a case-by-case basis. *Id.* (¶ 31).

In the present matter, the legislature authorized the Permit Board to issue, deny, modify, or revoke air and water pollution control permits considering any information it deems

relevant . . . under any conditions it deems necessary that are consistent with the Commission's regulations. Miss. Code Ann. § 49-17-29 (3)(c). The Commission's regulations allow the Permit Board to revoke a state permit for cause. 11 Miss. Admin. Code R. 1.1.5 A.(3) and C (5). While the Commission did not define cause for revocation of state permits, it adopted the federal regulations listing items that would constitute cause for terminating National Pollutant Discharge Elimination System (NPDES) permits. 11 Miss. Admin. Code Pt. 6. R. 1.1.5.C (1)(d). (*adopting* 40 C.F.R. §§ 122.64 and 144.40 [Termination of Permits] by reference). The court in *Desai* considered definitions of "good faith" from other areas of jurisprudence and found there was substantial evidence supporting the Commission's finding that there was not a good faith effort to comply. In the present matter, the Permit Board acknowledged that the federal definition for cause, which was incorporated by reference into the state NPDES regulations, does not apply to state operating permits such as the Permit issued to Gold Coast. RE. 25; R. MEQPB/GCC 0092 (¶ 72). However, the Permit Board found the federal definition as "instructive." *Id.* The Permit Board also considered it instructive to consider the factors listed in the state regulations that it would consider if determining whether to issue a permit. *Id.* (*citing* 11 Miss. Admin. Code Pt. 6, R. 1.1.3.H (1)).

"'An act is arbitrary when it is done without adequately determining principle; not done according to reason or judgment, but depending upon the will alone . . . .'" *Desai*, 868 So. 2d at 388 (*citing McGowan v. Mississippi State Oil & Gas Bd.*, 604 So. 2d 312, 322 (Miss. 1992); *Mississippi State Dept. of Health v. Southwest Mississippi Regional Medical Center*, 580 So. 2d 1238, 1240 (Miss. 1991)). "'[A]n act is capricious when it is done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles . . . .'" *Id.* The Permit Board has broad authority to revoke a permit

based on any information it deems relevant under any conditions it deems necessary consistent with the regulations. Miss. Code Ann. § 49-17-29 (3)(c). The regulations specifically authorized the Permit Board to revoke state permits for cause. While the regulations did not define cause for revoking state permits, they did incorporate federal definitions for cause for revoking NPDES permits, and they also listed items the Permit Board could consider in determining whether to issue a permit in the first place. The Permit Board's reliance on these comparable regulations was based on reason and not depending upon its will alone. This is the opposite of arbitrary and capricious.

2. Gold Coast knew the Permit Board could revoke the Permit for cause for violations.

Gold Coast's argument that the Permit Board created an after-the-fact subjective definition of "cause" is confounding given that at its meeting on August 13, 2019, the Permit Board discussed its concerns regarding issuing the Permit given its compliance history and only issued the Permit after being assured significant violations could justify revocation. RE. 8–9; R. MEQPB/GCC 0075–0076 (¶ 25). MDEQ's General Counsel Roy Furrh advised the Permit Board that it could consider an applicant's compliance history, financial capability and responsibility, "or any other aspect of the applicant's history it deems necessary or appropriate" in determining whether to issue a permit. RE. 314; R. MEQPB/GCC 1720 (11:14–25) (*citing* 11 Miss. Admin. Code Pt. 6, R. 1.1.3.H (1)). He further stated that if there were significant violations, MDEQ could ask the Board to revoke the Permit. RE. 324; R. MEQPB/GCC 1730 (21:4–9).

When the Permit Board's Chair[18] asked whether Gold Coast could revert to shipping wastewater out of state if Gold Coast failed to comply with the Permit, Mr. Furrh stated that the Board would need to act on the Permit again, that the Permit would have to be revoked, and that permit revocation would not be automatic. RE. 326; R. MEQPB/GCC 1732 (23:15–23). Gold Coast interprets this as Mr. Furrh's "concession" that he knew the Permit Board would have to act in a lawful manner and objectively if it later wished to revoke the Permit. (Dkt. # 30, p. 14). It should come as no surprise that MDEQ's general counsel told the Permit Board that it had to comply with the law before it could revoke a permit and that the law required a process before the Permit could be revoked. This is not a "concession"; it is good legal advice.

Nor was Mr. Furrh's advice "equivocal" as Gold Coast alleges or an acknowledgment that the Commission had to promulgate an objective standard for cause. Anyone, who was present at the August 13, 2019, Permit Board meeting, including Gold Coast's capable attorney and its engineering consultant, knew that the Permit Board would consider significant violations as cause to revoke the Permit. Chair Wittmann explicitly said as much:

> [T]he compliance history is kind of what gives me the concern, and in order to ensure that if this is approved, that [they] are remaining in compliance, and then if there is a compliance issue, that there could be the ability to revoke the permit if needed.

RE. 324–325; R. 1730–1731 (21:24–22:4).

Further, as discussed previously, the Commission was not required to promulgate an objective standard or definition for cause. Even so, instead of creating an after-the-fact subjective standard, as Gold Coast argues the Permit Board did, the Board considered the same factors that it would have considered had Gold Coast's permit been an NPDES permit. Those factors include

[18] The transcript of the August 13, 2019, Permit Board meeting mistakenly attributes this question to the "Hearing Officer." The August meeting was not a hearing, and the question was asked by Chris McDonald, who was the Permit Board's Chair at the time.

whether the permittee failed to comply with any permit conditions, whether the permittee failed to fully disclose all relevant facts during the application or permit issuance process, whether the permittee misrepresented any relevant facts at any time, whether the permitted activity endangered human health or the environment and could only be regulated to acceptable levels by permit modification or termination, or whether there was a change in a condition that required reduction or elimination of discharge. RE. 25; R. MEQPB/GCC 0092 (¶ 72) (*citing* 40 C.F.R. § 122.64 (a)). The Permit Board did not act arbitrarily and capriciously in revoking the Permit in the absence of an objective standard that the Commission was not obligated to promulgate.

3. Substantial evidence of Gold Coast's numerous violations supports the Permit Board's conclusion that there was cause to revoke the permit.

The Permit Board listed eight items which it ruled constituted cause for revoking Gold Coast's permit. RE. 25–26; R. MEQPB/GCC 0092–0093 (¶¶ 73–80). It also found that Gold Coast's misrepresentations attributing delays in installing aerators and related equipment to COVID-19 and other unanticipated delays constituted cause for revocation. RE. 26; R. MEQPB/GCC 0093 (¶82). It also found that Gold Coast's endangerment to human health and to the environment caused by the hydrogen sulfide gas release and the 418,000-gallon wastewater release constituted cause for revocation. RE. 26–27; R. MEQPB/GCC 0093–0094 (¶¶ 83–84). The Permit Board found the above "individually and in the aggregate constitute[d] cause for revocation." RE. 27; R. MEQPB/GCC 0093 (¶ 87).

As Gold Coast pointed out, the Permit Board considered Gold Coast's compliance history regarding its discharges to the Cities of Brandon, Pelahatchie, and Jackson before issuing the Permit. That does not preclude the Permit Board from again considering this history given that Gold Coast's subsequent actions demonstrate the same disregard for environmental laws and regulations as they did in those matters. Gold Coast also argues that the stormwater issues were

"marginal" and that such a minor violation would not justify revoking its state operating permit. While the stormwater violations alone may not have led to revocation under normal circumstances, that Gold Coast demonstrated such disregard for the stormwater permit requirements shortly after it was granted a permit to construct and operate the lagoon demonstrated Gold Coast's continuing disdain for complying with environmental laws and regulations. This was more of the same from Gold Coast, and the Permit Board had obviously had enough.

If numerous permit violations, a misrepresentation regarding why it took eight months to activate the aerators, a toxic gas release that sent people to the hospital, a multitude of verified complaints about nauseating odors and a plague of flies that created miserable conditions for residents almost a mile away, and pollution of a nearby creek that could have been avoided had Gold Coast installed the proper equipment are not cause for revoking a permit, it is difficult to imagine what is. As Gold Coast's counsel acknowledged at the evidentiary hearing:

> And in all good conscience, frankly, if the Permit Board makes its decision on the strength of 2020, then we lose. There's no way around that.

RE. 72; R. MEQPB/GCC 1326 (43:15–18). The Permit Board did make its decision on the strength of the events that occurred in 2020 and revoked the permit. RE. 27; R. MEQPB/GCC 0094 (¶ 85). Substantial evidence supports its decision. This Court should affirm.

III. CONCLUSION

The Permit Board revoked the Permit after holding an open meeting at which Gold Coast's representatives fully participated and affirmed the decision after a full *de novo* evidentiary hearing which was also an open meeting. The law does not authorize this Court to void actions taken in open meetings. Further, the Commission was not required to promulgate an

"objective standard" for cause. The Permit Board's finding that there was cause to revoke the Permit was not arbitrary and capricious, was supported by substantial evidence, was within its authority to make, and did not violate Gold Coast's constitutional or statutory rights. The Court should affirm the Permit Board's decision.

Respectfully submitted,

MISSISSIPPI ENVIRONMENTAL QUALITY PERMIT BOARD

BY: Its Attorneys

/s/Lisa Thompson Ouzts

Roy Furrh (MSB #4321)
Donna Hodges (MSB #9561)
Gretchen Zmitrovich (MSB # 101470)
Lisa Thompson Ouzts (MSB #9042)

Legal Division
Mississippi Department of
Environmental Quality
Post Office Box 2261
Jackson, Mississippi 39225
(601) 961-5340
rfurrh@mdeq.ms.gov
dhodges@mdeq.ms.gov
gzmitrovich@mdeq.ms.gov
louzts@mdeq.ms.gov

CERTIFICATE OF SERVICE

I, Lisa Thompson Ouzts, Senior Attorney for the Mississippi Department of Environmental Quality, certify that I filed the Appellee's Brief on behalf of the Mississippi Environmental Quality Permit Board electronically through the Court's MEC system which caused copies to be sent to the counsel of record listed below:

Andrew Taggart, Esq.
Ellen Royal, Esq.
Taggart, Rimes & Wiggins, PLLC
100 Renaissance Building
1022 Highland Colony Parkway, Suite 101
Ridgeland, MS 39157

This the 21st day of October, 2021.

/s/ Lisa Thompson Ouzts
Lisa Thompson Ouzts