**IN THE MISSISSIPPI COURT OF APPEALS**

**No. 2022-SA-01068-COA**

**EEECHO, INC., ET AL.**

*Appellants*

v.

**MISSISSIPPI ENVIRONMENTAL QUALITY PERMIT BOARD, ET AL.**

*Appellees*

On Appeal from the Chancery Court

of Harrison County, Mississippi

# REPLY BRIEF OF APPELLANTS EEECHO, INC. ET AL.

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**ORAL ARGUMENT REQUESTED**

## STATEMENT ON ORAL ARGUMENT

Appellants EEECHO et al. assert that oral argument is necessary in this matter because the Mississippi Environmental Quality Permit Board ("Permit Board") failed in its duty to account for statutory requirements in their review of Appellee the Mississippi State Port Authority at Gulfport's (the "Port Authority's") application for a water quality certification under the delegated authority of the Clean Water Act. Oral argument will aid the Court with the many state statutes demonstrating that the Permit Board failed to comply with its statutory duty as well as the similar nature of this matter to existing fact patterns decided by the Mississippi Supreme Court in *Hinds County v. Mississippi Department of Environmental Quality*.

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## SUMMARY OF ARGUMENT

Before certifying that a project will not detrimentally impact water quality in Mississippi, the Permit Board must follow state statutes, state regulations, and state jurisprudence.[1] The Permit Board failed this duty in four instances and did not rebut EEECHO et al.'s contentions otherwise. First, the Permit Board did not perform its statutory duty to investigate the nature of the proposed project, and second, it did not provide the public with sufficient notice of the precise nature of the activity that it has authorized. Third, the Permit Board also abstained from properly considering the alternatives analysis as required by law. Finally, the Permit Board chose to ignore how impacts to water quality can have direct and indirect effects on the environmental *and* social fabric of a community, in contravention of the jurisprudence of the Mississippi Supreme Court.

First, the Permit Board has not—*in any instance or forum*—ever analyzed or addressed the possibility that explosive ammunition may be stored at the North Port Property and that such storage could contaminate nearby waters. The Permit Board failed to respond to EEECHO et al.'s argument concerning the Permit Board's statutory duties regarding this possibility, instead articulating that because the project "may" result in such storage, the Permit Board was free to ignore that fact and focus only on what was before it from the Port Authority. State statutes, however, require more. The statutes create an independent duty on the Permit Board to investigate the nature of projects, including an obligation to go beyond the self-serving descriptions that applicants provide about their projects. At no time is this truer than when applicants like the Port

[1] In June, the Supreme Court of the United States issued a decision which may impact the State's and the Port Authority's § 401 obligations in matters similar to this case. *See generally Sackett v. Envtl. Prot. Agency*, 143 S. Ct. 1322, 1344 (2023). The United States Army Corps of Engineers ("USACE") has not issued new guidance regarding how *Sackett* impacts existing matters where applicants previously voluntarily agreed to the jurisdictional nature of the waters at issue. Thus, here, *Sackett* does not make this matter moot. Moreover, the Mississippi Supreme Court recognizes the need for an exception to the rule around mootness when an underlying rule is at issue. *Strong v. Bostick*, 420 So. 2d 1356, 1359 (Miss. 1982). Here, "it would be distinctly detrimental to the public interest…should [there] be a failure by the dismissal [of this matter] to declare and enforce a rule for future conduct." *Sartin v. Barlow ex rel. Smith*, 16 So. 2d 372, 376 (Miss. 1944); *see also Misso v. Oliver*, 666 So. 2d 1366, 1369 (Miss. 1996); *see generally Davis v. Guido*, 308 So. 3d 874 (Miss. Ct. App. 2020) (in an action seeking review of the State Oil and Gas Board's approval of a drilling permit, that the public interest exception applied because the board's history of allowing informational changes to applications would invite more challenges and thus hinder its mandated function). For the current parties, as well as all future permit applicants with an interest in water quality certifications, it would be detrimental if this Court were to decline to declare and enforce the statutory rules the Permit Board must follow in reviewing future certification applications.

Authority seek approval for the construction of sites like the Military Project for the Department of Defense which is bordered by North Gulfport residential developments directly to the north of the project site. [Admin. ROA. 375, 540]. In its briefing, the Permit Board assumes a posture that allows it to evade these statutory obligations while at the same time placing the onus entirely on the public to raise, develop, and litigate issues that are instead under the Permit Board's statutory mandate to investigate and consider.

Second, the Permit Board agrees with EEECHO et al. that two different regulations pertaining to the Application and Public Notice and Public Hearing of water quality certifications are applicable to the § 401 water quality certification at issue, # 2018036 (the "§ 401 WQC"). These two regulations stipulate that a complete application for a water quality certification *and* the Public Notice of that same application must contain complete descriptions of proposed activities and discharges like the storage of explosive ammunition. The Public Notices for the Military Project were legally insufficient with these two regulations because they did not mention explosive ammunition, requiring remand of the matter.

Third, state law requires the Permit Board to analyze and apply the eleven (11) Scope of Review Factors, which means it must look behind the self-serving papers that the Port Authority provides to the Permit Board. Regarding the first factor, feasible alternatives to the activity, the Permit Board must independently verify the Port Authority's representations when carrying out its duty to eliminate unreasonable degradation and irreparable harm to waters of the State. The Permit Board failed to carry out this legal requirement.

Finally, under the jurisprudence of the Mississippi Supreme Court, the Permit Board has an obligation to consider environmental justice concerns in water quality certifications, like the present § 401 WQC. The Supreme Court previously held that the Permit Board must consider environmental justice in a case where the Permit Board's underlying statutory authority contained similar considerations as the Permit Board's underlying regulatory authority in the current case. The Permit Board attempts to evade this obligation by insisting there is no connection between water quality and the valid social and environmental concerns of the North Gulfport communities, which is without merit.

## ARGUMENT

### A. Statutory authorities create a duty that the Permit Board must investigate the nature of activities that are to be carried out at the Department of Defense Military Project when administering the application for the § 401 WQC.

The Permit Board, to this day, *has never addressed nor analyzed, much less adjudicated* the matter of explosive ammunition storage at the North Port Property. Because it forfeited its duties, the Port Authority could place explosive ammunition at the North Port Property in the future *without such a circumstance having ever been considered during administration of the § 401 WQC*.

The Permit Board states that the Mississippi Department of Environmental Quality ("MDEQ") serves as its staff, providing technical, legal, and administrative support to the Permit Board.[2] The MDEQ's obligations to conserve, manage, develop and protect the natural resources of the state within its jurisdiction under MISS. CODE ANN. § 49-2-7 are as much the Permit Board's as they are the MDEQ's. EEECHO et al.'s Brief, p. 19-21.

As EEECHO et al. pointed out in their principal brief, the Permit Board was created:

> "for the purpose of issuing, reissuing, modifying, revoking or denying, under the conditions, limitations and exemptions prescribed in Section 49-17-29…(d) *water quality certifications required by Section 401 of the federal Clean Water Act.*"

MISS. CODE ANN. § 49-17-28(1) (emphasis added). EEECHO et al.'s Brief, p. 20-1. The Permit Board agrees with this.[3] Section 49-17-29 states that:

> "…the Permit Board created by Section 49-17-28 shall be *the exclusive administrative body to make decisions* on permit issuance, reissuance, denial, modification or revocation of…water pollution control permits…*and all other permits within the jurisdiction of the Permit Board*."

[2] Permit Board's Brief, p. 2 fn. 1; The MDEQ "is tasked with providing technical assistance and support to the…Permit Board, and its duties include conserving, managing, developing, and protecting the State's natural resources." *Miss. Comm'n on Envtl. Quality v. Bell Utilities of Miss. LLC*., 135 So. 3d 868, 871 (Miss. 2014); *see also Golden Triangle Regional Solid Waste Mgmt., Auth. v. Citizens against the Location of the Landfill*, 722 So. 2d 648, 650 (Miss. 1998).

[3] Permit Board's Brief, p. 2 fn. 1.

MISS. CODE ANN. § 49-17-29(3)(a) (emphasis added). Here, the word *permit* is understood to include water quality certifications.[4] The Permit Board does not disagree. The statute further provides that:

> "[a]ll persons required to obtain…water pollution control permit[s]…*or any other permit within the jurisdiction of the Permit Board* shall make application for that permit with the Permit Board."

MISS. CODE ANN. § 49-17-29(3)(c) (emphasis added). EEECHO et al.'s Brief, p. 19-21. Again, the Permit Board does not dispute this. This same regulation authorizes the Permit Board to require the submission of plans, specifications, and information to carry out *Sections 49-17-1 through 49-17-43* of the Mississippi Annotated Code. MISS. CODE ANN. § 49-17-29(3)(c). The Permit Board is tasked with carrying out these regulations to conserve and protect the waters of the state used for domestic, recreational, and other legitimate beneficial uses, from pollution, which "constitutes a menace to public health and welfare [and] creates public nuisance[s]" that are harmful to these uses. MISS. CODE ANN. § 49-17-3. The Permit Board is also authorized to:

> "…issue, reissue, deny, modify or revoke…water pollution control permit…*or any other permit within the jurisdiction of the Permit Board* under any conditions it deems necessary that are consistent with the commission's regulations."

MISS. CODE ANN. § 49-17-29(3)(c) (emphasis added). Despite these statutory mandates, the Permit Board's position is that it is EEECHO et al.'s burden—and implicitly, the public's burden—to raise and develop an issue as fundamental to water quality protection as whether explosive ammunition and other military equipment could have a detrimental impact on water quality from runoff, accidents, or general storage when it is martialed in connection with the Military Project.

By taking such a stance, the Permit Board is forfeiting its duties to conserve, manage, and protect the waters of the state—and their many beneficial uses—from the public nuisances created by pollution of these state waters. MISS. CODE ANN. §§ 49-2-7; 49-17-3. But the Permit Board goes even further and puts forth "that the regulations put the onus on project applicants [i.e., the Port

[4] The regulations governing water quality certifications make it clear that "[f]or purposes of MISS. CODE ANN. § 49-17-29(3)(A), the word 'permit' in the phrase 'permit issuance, reissuance, denial, modification or revocation' and in the phrase 'all other permits within the jurisdiction of the Permit Board' includes water quality certification actions taken pursuant to these regulations…" 11 MISS. ADMIN. CODE PT. 6, R. 1.3.1(B)(2).

Authority] to fully describe their project, describe the purpose and intent of the project…" Permit Board's Brief, p. 22.

Under the Permit Board's view, the burden to describe and/or uncover the nature of the Military Project belongs to everyone *except* the Permit Board. The basic error with this rationale is that it ignores the Permit Board's statutorily imposed duty under the Mississippi Annotated Code, Sections 49-17-28 and 49-17-29. The Permit Board is empowered to require the submission of plans, specifications, and other information to carry out *Sections 49-17-1 through 49-17-43*, when deciding whether to issue, deny, or modify permits like the § 401 WQC for the Military Project. MISS. CODE ANN. §49-17-29(3)(c); EEECHO et al.'s Brief, p. 16, 20-22, 29. By placing its own burden on the public and the Port Authority, the Permit Board attempts to evade its obligations—*as the exclusive body with jurisdiction over water quality certifications required by Section 401 of the Clean Water Act*—to investigate the applications it is to administer. MISS. CODE ANN. §§ 49-17-28; 49-17-29(3)(a). The Permit Board skirts its duty to utilize the regulations to carry out, among other goals, the stated legislative intent to conserve and protect the waters of the state—and their many beneficial uses—from pollution. MISS. CODE ANN. § 49-17-3. Furthermore, the Permit Board escapes its statutory duty to conserve, manage, develop, and protect the natural resources of the state. MISS. CODE ANN. § 49-2-7. It also arbitrarily and capriciously undermines its duty to determine if the presence of the explosive ammunition would require denial of the § 401 WQC under the relevant regulation.[5] EEECHO et al.'s Brief, p. 5, 16-7, 22-24. Such an outcome is not only contrary to a plain reading of these statutes but is also not worthy of deference. *King v. Military Dep't*, 245 So. 3d 404, 408 (Miss. 2018) ("[w]e announce today that we abandon the old standard of review giving deference to agency interpretations of statutes."). It also runs counter to case law which recognizes that the Permit Board, like all apparatuses of the state, has duties to the public that it *must exercise*.

[5] 11 MISS. ADMIN. CODE PT. 6, R 1.3.4(B) requires denial of the water quality certification, unless the Permit Board is assured that appropriate measures will be taken to eliminate unreasonable degradation and irreparable harm to waters of the State. Determinations include, among others, if there are feasible alternatives to the activity which reduce adverse consequences on water quality and classified or existing uses of waters of the State, that the proposed activity in conjunction with other activities may result in adverse cumulative impacts, or that it will result in significant environmental impacts which may adversely impact water quality. 11 MISS. ADMIN. CODE PT. 6, R 1.3.4(B)(2),(5) & (8).

It is well understood that "[a]dministrative agencies must perform the function required of them by law." *State Tax Comm'n of the State of Miss. v. Earnest*, 627 So. 2d 313, 320 (Miss. 1993) quoting *Miss. State Tax Comm'n v. Miss. Ala. State Fair*, 22 So. 2d 664, 665 (Miss. 1969). There is no question that the MDEQ "is tasked with providing technical assistance and support to the…Permit Board, and its duties include conserving, managing, developing, and protecting the State's natural resources." *Miss. Comm'n on Envtl. Quality v. Bell Utilities of Miss. LLC*., 135 So. 3d 868, 871 (Miss. 2014); Permit Board's Brief, p. 2 fn. 1. The Permit Board is charged as the exclusive body to make decisions concerning water quality certifications required under Section 401 of the Clean Water Act, yet it "failed to consider an important aspect of the problem" and its explanation that the burden to raise and develop all issues resides exclusively with the public and/or the Port Authority "is so implausible that it [can] not be ascribed to a difference in view or the product of agency expertise." *Riverbend Utils., Inc. v. Miss. Envtl. Quality Permit Bd.,* 130 So. 3d 1096, 1101-02 (Miss. 2014). "An administrative appeal is law driven. [It is also] public policy driven. And public policy is uniquely fitted for the legislature. The legislature has delegated the permitting decision to the Permit Board." *Sierra Club v. Miss. Envtl. Quality Permit Bd.,* 943 So. 2d 673, 677 (Miss. 2006). The Permit Board's attempt to avoid its responsibility and the "best reading" of Section 49-17-29(3)(c) is not entitled to deference. *Sierra Club,* 943 So. 2d 673 at 679 (Miss. 2006); *see also King v. Military Department*, 245 So. 3d 404, 408 (Miss. 2018) (courts no longer defer to an agency's interpretation of the statutes under which it operates). Further, there is "no indication" that the Permit Board considered the consequences of the presence of explosive ammunitions at the North Port Property. *Miss. Sierra Club, Inc. v. Miss. Dep't of Envtl. Quality*, 819 So. 2d 515, 525 (Miss. 2002). The Permit Board did not consider the consequences when it published the Second Public Notice in April of 2019, nor when the Permit Board initially issued the § 401 WQC during an open session in August of 2019 [Admin. ROA. 55-57; 1953-54]. The Permit Board did not consider the consequences during the two-day evidentiary hearing it presided over in February and April of 2021, nor did it consider the consequences in April of 2021 when the Permit Board reaffirmed its earlier issuance of the § 401 WQC following the evidentiary hearing [Admin. ROA.83-4, 956-1566]. In other words, at no time did the Permit Board exercise its independent judgment and command the Port Authority to address this key issue of concern, nor did the Permit Board examine how to mitigate for water quality impacts that will come from the creation of this large martialling area for explosive ammunition.

By failing to carry out statutory and regulatory duties, the Permit Board's "methodology in this instance does not exhibit the kind of fair play that the public has a right to expect of its administrative agencies." *McGowan v. Miss. State Oil & Gas Bd.*, 604 So. 2d 312, 319-20 (Miss. 1992); *see also Miss. Dep't of Envtl. Quality v. Weems*, 653 So. 2d 266, 282 (Miss. 1995) (stating that the MDEQ "owed a much higher duty to the citizens of [the county] than was exercised in this case [and that t]here was no recognition of their serious obligation to insure [sic] that the best qualified companies were awarded a permit.").

The Permit Board failed to inquire about whether explosive ammunition will be stored in connection with the Military Project. It was statutorily obligated to do so. As such, the Permit Board also failed to consider the possible detrimental impact on water quality in Turkey Creek that may result from the storage of explosive ammunition. It is required by regulations to do so.[6] EEECHO et al.'s Brief, p. 5, 16-7, 22-24. Instead, the Permit Board simply states that EEECHO et al. failed to develop the issue during the administrative hearing, that EEECHO et al.'s assumption that the Port Authority will martial explosive ammunition is flawed, and that a subsequent Baseline Storm Water General Permit for Industrial Activities ("Industrial Permit") will account for munitions in any event. Permit Board's Brief, p. 13-14. These factual arguments distract from the point that it is the Permit Board's duty—not the community's—to ensure the Military Project will not impact Turkey Creek. The Permit Board failed in this statutorily imposed duty.

Regarding the Permit Board's assertion that EEECHO et al. failed to raise the issue of ammunition storage, EEECHO et al. did in fact assert their concerns to the state agency by specifically stating the following in their September 2019 request for an evidentiary hearing:

> It is unclear from the permit application and certification what contamination from industrial wastes or dissolved solids will result from the ongoing use of the railway spur and from the ongoing storage and marshaling for the Department of Defense at the site. Depending on what is stored and marshalled there, and how it is stored, a degree of treatment may be required to protect the State's waters and human health and welfare from chemicals, **ammunition**, industrial wastes and solids that would travel from the site via surface water and the air. Introduction of industrial materials

[6] 11 MISS. ADMIN. CODE PT. 6, R 1.3.4(A) lists eleven factors that **will be considered** by the Permit Board. Each of these factors would be implicated by the storage of explosive ammunition and must therefore be considered with such storage in mind. The policy of the Permit Board is to then deny a water quality certification if certain determinations are made. 11 MISS. ADMIN. CODE PT. 6, R 1.3.4(B).

> and solids into the waters of the State would impair the reasonable or legitimate use of State waters and would create conditions in Turkey Creek and Bernard Bayou that are injurious to the public health and recreation.

[Admin. ROA. 131] (emphasis added). Yet in the face of such a request, the Permit Board failed to make either pointed inquiries and or findings of fact regarding the storage of explosive ammunition. [Admin. ROA.2-25]. Under the Permit Board's posture, it becomes the burden of the public to subpoena applicants like the Port Authority for important documents like the Port Planning Order ("PPO") that references the explosive ammunition.[7] This is certainly not the Mississippi Supreme Court's understanding of the Permit Board's duties and the public's expectations of fair play from its administrative agencies and cannot be allowed to stand. *McGowan v. Miss. State Oil & Gas Bd*., 604 So. 2d 312, 319-20 (Miss. 1992). The Permit Board failed to act on a fundamental question regarding the water quality certification application, even after EEECHO et al. raised the issue. The Permit Board had an obligation under multiple statutory authorities detailed above to require the submission of plans, specifications, and other information needed to get to the bottom of EEECHO et al.'s concerns and doubts about the storage and marshaling of ammunition. *Sierra Club* 943 So. 2d 673 at 678 (stating that an action is arbitrary and caprcious 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); *see also McGowan v. Miss. State Oil & Gas Bd*., 604 So. 2d 312 (Miss. 1992) (state agencies must provide rational bases for arriving at their decisions). More broadly, it had a duty to the public to investigate if explosive ammunition may be martialed at the site. It failed to do so, and this legal error should result in remand.

Tellingly, both Appellees inherently recognize that the PPO's language about the explosive ammunition is vague and could allow for the eventuality of its storage. They both attempt now to interpret the PPO that references the explosive ammunition in their briefing for this honorable Court. Permit Board's Brief, p. 12-13; Port Authority's Brief, p. 10. These attempts at interpreting the PPO are distractions, as such inquiries are of a fact-finding nature and are more appropriately handled by the Permit Board when it is administering the certification process, and not on appeal. This attempt at explaining the meaning, and downplaying the significance, of the PPO is ad hoc

[7] The PPO was produced in response to a subpoena duces tecum to the Port Authority [Admin. ROA. 693-711].

and should be disregarded by this Court. *McGowan v. Miss. State Oil & Gas Bd.*, 604 So. 2d 312, 322 (Miss. 1992) (condemning ad hoc decision-making by agencies). Further, the fact that the Permit Board and the Port Authority each engage in these attempts now supports EEECHO et al.'s request that the matter be remanded to the Permit Board.

Finally, both Appellees state that because the Permit Board included a condition requiring the Port Authority to comply with the Industrial Permit, then the Permit Board considered whether there could be adverse impacts to water quality during project operations. Permit Board's Brief, p. 13-4; Port Authority's Brief, p. 10-2. The federal regulation cited by the Permit Board in its briefing, 40 C.F.R. § 122.2, includes munitions in its definition of pollutant. The Permit Board even highlights munition to support its contention that it "did consider that there could be adverse impacts to water quality during project operations…the additional coverage requires [the Port Authority] to identify potential sources of pollution in its stormwater pollution prevention plan and describe and implement best management practices to reduce pollutants in its stormwater discharges." Permit Board's Brief, p. 14. By pointing to this regulation, Appellees implicitly recognize that there is *doubt* and *uncertainty* on the matter and therefore a *possibility* that explosive ammunition will be stored at the North Port Property and that such storage could have water quality impacts of significance to the impaired Turkey Creek. But rather than address the matter in the disputed § 401 WQC, the Permit Board insinuates that this possibility will be accounted for in a later permitting process. The Permit Board cannot ignore its statutory duties when administering the § 401 WQC, by assuming the next permit will handle it. Permit Board's Brief, p. 13-4. Appellees insist that the PPO merely expresses a preference for suggested capabilities and does not represent an obligation to martial explosive ammunition. Permit Board's Brief, p.12-3; Port Authority's Brief, p.10. But the Permit Board and the Port Authority cannot have it both ways. They cannot in one breath tell this honorable Court that the PPO, when properly interpreted, does not contemplate the storage of explosive ammunition on the North Port Property, and in the next, tell the Court that some other permit will account for munitions on site and that it will remedy any impact to water quality. Under state law, the Permit Board was obligated to consider the effect of explosive ammunition on site and failed to do so.

For all the above reasons, the Permit Board failed to use its statutory authority to investigate and procure information about the nature of the Military Project and as such, remand should be granted.

**B. The two Public Notices did not provide sufficient detail as required by state statutes.**

Regarding Public Notice of water quality certifications, the Permit Board agrees that 11 MISS. ADMIN. CODE PT. 6, R. 1.3.2 and 11 MISS. ADMIN. CODE PT. 6, R. 1.3.3[8] are applicable to the public notice of the § 401 WQC at issue, just as EEECHO et al. pointed out in their principal brief. EEECHO et al.'s Brief, p. 4-5, 13, 26-7; Permit Board's Brief, p. 16. These regulations address, respectively, Applications and Public Notice and Public Hearing for water quality certifications. The Permit Board agrees that these regulations require public notice of all water quality certification applications, as well as complete descriptions of the proposed activities and discharges, along with other requirements. 11 MISS. ADMIN. CODE PT. 6, R. 1.3.2; 11 MISS. ADMIN. CODE PT. 6, R. 1.3.3; Permit Board's Brief, p. 16-7. These regulations require that a complete application for a water quality certification must contain the possibility of the storage of explosive ammunition. EEECHO et al.'s Brief, p. 26-7. The Permit Board does not dispute that the Joint Application and Notification submitted to the MDEQ in April of 2018 serves as part of public notice. 11 MISS. ADMIN. CODE PT. 6, R. 1.3.2(A); Permit Board's Brief, p. 16. The relevant portion of the Joint Application and Notification that provides the project description did not mention the storage of explosive ammunition. [Admin. ROA. 423-4]. No other portion of the Joint Application and Notification mentioned explosive ammunition. The June 2018 Joint Public Notice soliciting public comment did not mention explosive ammunition either. [Admin. ROA. 509-12]. The Permit Board later published the Second Public Notice in April 2019 soliciting public comment—it did not mention explosive ammunition. [Admin. ROA. 1953-54]. Because neither of the two Public Notices nor the Joint Application contained a description that contemplated the storage or martialing of explosive ammunition, they were legally insufficient with the regulations that the Permit Board agrees are applicable. This requires a remand of the matter to the Permit Board.

The Permit Board does, however, dispute the applicability of 11 MISS. ADMIN. CODE PT. 6, R. 1.1.3(B)(1) and 11 MISS. ADMIN. CODE PT. 6, R. 1.1.3(C)(1)(D) to the § 401 WQC at issue. These two regulations are important because, between them, they establish that notice methods must be done in accordance with federal regulations, and they provide that an additional level of detail

[8] The Term 'Department' in Rule 1.3.2 through 1.3.4 means: In a case where the Permit Board has not authorized the Executive Director to act on a certification, or where the Executive Director has determined that the action should be taken by the Permit Board.11 MISS. ADMIN. CODE Pt. 6, R. Rule 1.3.1(B)(2)(b).

must be contained in such notices. Regarding 11 MISS. ADMIN. CODE PT. 6, R. 1.1.3(B)(1), the regulation states that:

> "[t]he executive director or his/her authorized representative shall prepare a public notice of a draft NPDES or UIC permit, or a **State permit** as deemed appropriate by the Permit Board. The Notice shall be made in accordance with the public notice methods contained in 40 CFR, 124.10(c) and (d) which are incorporated herein the adopted reference."

11 MISS. ADMIN. CODE PT. 6, R. 1.1.3(B)(1) (emphasis added). EEECHO et all contend that the § 401 WQC at issue is a State permit, which is defined as:

> "…**an individual** or general permit issued **by the Permit Board** pursuant to regulation adopted by the Commission and/or **Permit Board under Miss. Code Ann**. §§ **49-17-17 and 49-17-29**…**for discharges into State waters where an NPDES or UIC permit** may not be applicable…"

11 MISS. ADMIN. CODE PT. 6, R. 1.1.1(A)(66) (emphasis added). As stated earlier in this reply and in Appellant's brief, the § 401 WQC was issued pursuant to regulations adopted by the Permit Board under Section 49-17-29 which also authorizes the Permit Board to carry out Sections 49-17-1 through 49-17-43.[9] The § 401 WQC is clearly an *individual permit* as the term is used in 11 MISS. ADMIN. CODE PT. 6, R 1.1.1(A)(66) and is therefore a State permit, subject to the requirements of 11 MISS. ADMIN. CODE PT. 6, R. 1.1.3(B)(1). As such, the public notice of the § 401 WQC must be made in accordance with 40 CFR, 124.10(c) and (d), contrary to what the Permit Board declares. Permit Board's Brief, p.16.

Regarding the Permit Board's contention that 11 MISS. ADMIN. CODE PT. 6, R. 1.1.3.(C)(1)(D) is not applicable, the regulation itself states:

> A public notice of a draft **State**, UIC, or NPDES permit shall contain the following:
> …
> (d) a concise description of the activities and operations which result in the discharge identified in the draft permit.

11 MISS. ADMIN. CODE PT. 6, R. 1.1.3.(C)(1)(D) (emphasis added). Having already established above that the § 401 WQC is a State permit, the public notice must contain "a concise description

[9] The Permit Board was created for the purpose of issuing water quality certifications required by Section 401 of the Clean Water Act MISS. CODE ANN. § 49-17-28. The Permit Board is also the exclusive body for making such decisions and it is authorized to request information to carry out Sections 49-17-1 through 49-17-43. MISS. CODE ANN. §§ 49-17-29(3)(a), 49-17-29(3)(c).

of the activities and operation which result in the discharge identified in the draft permit." 11 MISS. ADMIN. CODE PT. 6, R. 1.1.3.(C)(1)(D).

In any circumstance, the Permit Board failed to comply with regulatory notice provisions that it agrees are applicable because the two Public Notices and the Joint Application and Notification of the § 401 WQC did not contain complete descriptions of the activity to take place at the North Port Property. 11 MISS. ADMIN. CODE PT. 6, R. 1.3.2 and 11 MISS. ADMIN. CODE PT. 6, R. 1.3.3. The regulations the Permit Board states are inapplicable, provide additional obligations that must be followed when issuing State permits—which should be understood to include water quality certifications. Because the relevant Public Notices and Joint Application and Notification did not adequately apprise EEECHO et al. and the wider public about the possible storage of explosive ammunition, the matter must be remanded to the Permit Board.

### C. The Permit Board failed to carry out its duty to independently consider the feasible alternatives to the activity.

The Permit Board argues that EEECHO et al. "should be barred from asserting for the first time on appeal that the Permit Board's findings were deficient when they had an opportunity to submit comments before the [Permit] Board considered the draft findings." Permit Board's Brief, p. 19. This argument is without merit. The relevant statute is clear that any decision of the Permit Board may be appealed to the Chancery Court. MISS. CODE ANN. §§ 49-17-29(5)(a)-(b). The Permit Board attempts to confuse the issue by stating that EEECHO et al. cannot challenge the Permit Board's Findings of Fact, which is also clearly contrary to case law. *Sierra Club v. Miss. Envtl. Quality Permit Bd,* 943 So. 2d 673, 681 (Miss. 2006) (stating, "findings on factual issues must be specific enough for the reviewing court to determine whether the decision is supported by substantial evidence.") quoting *Miss. Sierra Club, Inc. v. Miss. Dep't of Envtl. Quality*, 819 So. 2d 515, 524 (Miss. 2002); *see also McGowan v. Miss. State Oil & Gas Bd.*, 604 So. 2d 312, 313 (Miss. 1992) (stating "the Board has not favored us with minimally adequate findings on these points, much less an explanation how it has evaluated and balanced competing interests and decided which should rule the day."). Additionally, the record is clear that this is not the first instance in which EEECHO et al. challenge the Permit Board's alternatives analysis, as this was one of the major issues argued by counsel for EEECHO et al. before the Permit Board during the two-day evidentiary hearing [Admin. ROA. 2, 7-10, 1172-83, 1247-51, 1260, 1272]. The sufficiency of the alternatives analysis was also challenged below in the Chancery Court. [ROA. 63-73]. What

EEEHO et al. challenge is the Permit Board's deficient alternatives analysis which is reflected in its Findings of Fact and in the series of documents in the lead up to the evidentiary hearing, including the Original Alternatives Analysis, Revised Alternatives Analysis, and the Port Authority's Review Rationale. [Admin. ROA 4-25; 1677-88; 1734-52; 2606-13].

Next, the Permit Board mischaracterizes EEECHO et al.'s argument regarding the Alternatives Selection Criteria by stating that Appellants are challenging the fact that "[c]ertification applicants—not the Permit Board—specify the site selection criteria and look for potential sites based on those criteria." Permit Board's Brief, p. 22. This is not the case. EEECHO et al. do not take issue with the Port Authority designating its own seven Alternatives Selection Criteria when deciding how to choose one alternative from many. EEECHO et al.'s Brief, p. 5-6. What EEECHO et al. do challenge as inappropriate, is that the Permit Board adopted the Port Authority's conclusory statements about each of the alternatives rather than engage in its own *independent review* as it is obliged to do for all eleven Scope of Review Factors articulated in state law. 11 MISS. ADMIN. CODE PT. 6, R 1.3.4(A); *see generally Miss. Sierra Club, Inc. v. Miss. Dep't of Envtl. Quality*, 819 So. 2d 515, 521 (Miss. 2002) (after considering whether the Commission correctly applied the factors of Mississippi's water quality regulations, the court stated that, "[t]he order…failed to express findings and reasoning with respect to numerous issues for this Court's judicial review pursuant to *McGowan."*). In this case, the Permit Board did not carry out its responsibility to consider the first of these eleven factors—feasible alternatives to the activity. EEECHO et al.'s brief, p.4-5. The relevant language of the regulation states that the factors "will be considered in determining certification action…" 11 MISS. ADMIN. CODE PT. 6, R 1.3.4(A). After consideration of the Scope of Review Factors, it is the policy of the Permit Board to deny certification under certain circumstances. 11 MISS. ADMIN. CODE PT. 6, R 1.3.4(B).[10] The Permit Board, once again, attempts to excuse itself from carrying out its obligations to consider the Scope of Review Factors when it states "the regulations put the onus on project applicants [i.e., the Port Authority] to fully describe their project, describe the purpose and intent of the project, and submit its analysis of alternatives that it considered in determining which alternative is available." Permit

[10] Relevant determinations, include, among others: if there are feasible alternatives to the activity which reduce adverse consequences on water quality and classified or existing uses of waters of the State, that the proposed activity in conjunction with other activities may result in adverse cumulative impacts; and that the proposed activity results in significant environmental impacts which may adversely impact water quality. 11 MISS. ADMIN. CODE Pt. 6, R. 1.3.4(B)(2), (5) & (8).

Board's Brief, p. 22. Such a posture allows the Permit Board to escape its statutorily imposed duties and is thus improper. For this reason, the matter must be remanded to the Permit Board.

The Permit Board states that its decision was supported with citations to portions of the record and hearing testimony. Permit Board's Brief, p. 20. However, this Court has stated that "implicit" in judicial review of an agency action "is a distinct disenchantment with the institutionalist style of so much agency decision making." *McGowan v. Miss. State Oil & Gas Bd.*, 604 So. 2d 312, 321-2 (Miss. 1992). This Court holds Mississippi State agencies to a higher standard, stating that:

> The reviewing court is charged to study the record and the legislative facts to which the challenged order points and divine a rational basis upon which the administrator may have acted. The standard invokes the rule of relevant resemblances and **proscribes unprincipled discrimination between and among those similarly situated**. It condemns ad hoc decision-making and, because it is a standard of judicial review, **imports an imperative that administrators say at least minimally why they do what they do so someone can see whether it be arbitrary or capricious**.

*McGowan* 604 So. 2d at 322 (Miss. 1992) (emphasis added). EEECHO et al.'s challenge remains that the Permit Board "has not exhibited its expertise" when it adopted, without analysis, the Port Authority's feasible alternatives analysis. *Id*. at 323. In abstaining from doing so, the Permit Board did not properly "consider" feasible alternatives to the activity, as it is required to do under the regulation. 11 MISS. ADMIN. CODE Pt. 6, R. 1.3.4(A)(1). As the Mississippi Supreme Court has held, the Permit Board "must clearly explain its factfinding and reasoning for a decision in order to facilitate review by the Courts." *Sierra Club v. Miss. Envtl. Quality Permit Bd,* 943 So. 2d 673, 681 (Miss. 2006). The "[c]onclusory remarks" that the Permit Board made in its Findings of Fact were practically lifted from the application documents the Port Authority submitted and thus they "do not equip a court to review the agency's findings." *Sierra Club* 943 So. 2d at 681.

For these reasons, the Permit Board failed in its duty regarding the consideration of feasible alternatives to the activity and the matter must be remanded to the Permit Board.

### D. An environmental justice review is required by the jurisprudence of the Mississippi Supreme Court.

The Mississippi Supreme Court found that an environmental justice review was required by state statute related to the location of landfills in communities, and this Court should recognize a similar obligation in the context of water quality certifications. The Permit Board and Port Authority both argue that the Permit Board was not required to conduct an environmental justice

review under the *Hinds County* decision because the Scope of Review Factors in a Clean Water Act Section 401 water quality certification are not related to social issues like land use, proximity to schools and churches, or aesthetic factors like noise levels. Permit Board's Brief, p. 30, fn. 20; Port Authority's Brief, p. 14-5. The Permit Board is mistaken because the Scope of Review Factors are similar to the underlying statutory authority in *Hinds County* which the Mississippi Supreme Court has stated requires an environmental justice review.

In that case, the Mississippi Supreme Court stated that the underlying statutory authority, MISS. CODE ANN. SECTION 17-17-229, encompassed the concept of environmental justice which must be considered by the Permit Board. *Hinds Cnty. v. Miss. Comm'n on Envtl. Quality*, 61 So. 3d 877, 886 (Miss. 2011). MISS. CODE. SECTION 17-17-229 did not explicitly mention the concept of environmental justice, nor did it say an environmental justice review was required. Nevertheless, the court interpreted the concept into the statute and a requirement that the Permit Board must consider the concept. In the *Hinds County* case, a non-exhaustive list of factors mentioned in MISS. CODE ANN. SECTION 17-17-229 include: hydrological and geological factors; natural resource factors like wetlands, proximity to parks and to wilderness and historical sites; land use factors like local land use, proximity to churches, schools, and other incompatible structures; transportation factors like route safety and method of transport; and finally aesthetic factors like visibility and noise level of the facility. *Hinds Cnty.,* 61 So. 3d at 884 (Miss. 2011). In the present case, the Scope of Review Factors contain several similar considerations, which include: feasible alternatives to the activity, mitigation, initial and secondary impacts on all waters, degree of physical, chemical, and biological impacts on waters, degree of consistency with water management plans, and storm water management. 11 MISS. ADMIN. CODE PT. 6, R. 1.3.4 (A)(1), (2), (3), (5), (8), (9). Because of the similarity between the Scope of Review Factors and the relevant statute in *Hinds County*, the concept of environmental justice fits within the criteria that the Permit Board must consider when it applies the Scope of Review Factors during the administration of water quality certifications.

The Scope of Review Factors—which all parties agree are applicable—should be interpreted to require environmental justice review because the degradation of water quality in the Turkey Creek Watershed will impact the communities of North Gulfport in a multitude of ways. This is similar to the way the factors under MISS. CODE ANN. SECTION 17-17-229 in *Hinds County*, having to do with the location and permitting of a landfill, would have affected community residents in a

way that the Mississippi Supreme Court knew would implicate the concept of environmental justice. The residents of the North Gulfport Communities, when expressing their opposition to the Military Project, pointed to concerns over the flooding of *homes and churches*, increased runoff, the lack of consideration for community safety and well-being, cumulative impacts, the detrimental consequences of lost wetlands and, of course, the historic community uses of Turkey Creek for fishing, swimming, and baptisms. [Admin. ROA. 1975; 1982; 1986-88; 1991-993, 2002-03]. Each of these concerns—which have both an environmental and social dimension to them—could potentially be addressed by at least one of the following relevant Scope of Review Factors: feasible alternatives to the activity, mitigation, initial and secondary impacts on all waters, the degree of physical, chemical, and biological impacts on the waters of the State, the degree of consistency with approved water quality management plans adopted by the Commission, and storm water management.[11] 11 MISS. ADMIN. CODE PT. 6, R. 1.3.4.(A)(1), (2), (3), (5), (8), (9). Although the Permit Board and the Port Authority both agree that the Scope of Review Factors Under 11 MISS. ADMIN. CODE PT. 6, R. 1.3.4 are applicable, no environmental justice analysis has been done to consider the demographics of surrounding communities, how impacts on water quality will affect the communities' historic and social uses of the waters, existing hazards sources, the impacts on flooded community resources like homes and churches, or how the loss of wetlands will exacerbate these problems. All these issues are ones that the Permit Board should have examined from an environmental justice perspective when applying the Scope of Review Factors to protect state waters. 11 MISS. ADMIN. CODE PT. 6, R 1.3.4(A). To consider the Scope of Review Factors in this way is similar to how the Mississippi Supreme Court in *Hinds County* looked to the underlying statutory authority—which did not have explicit environmental justice requirements—when stating that environmental justice was nevertheless within the scope of considerations that the Permit Board must consider. *Hinds Cnty. v. Miss. Comm'n on Envtl. Quality*, 61 So. 3d 877, 884-86 (Miss. 2011). In the present case, the Permit Board therefore did not meet its obligation to consider the concept of environmental justice in the way it applied these Scope of Review Factors during the administration of the § 401 WQC at issue.

[11] Indeed, the Permit Board argues that the Industrial Permit for storm water is meant to address some of these issues and thereby it implicitly agrees that these issues are to be considered by the Permit Board in the context of water quality. Permit Board's Brief, pg. 13-4.

The Permit Board's interpretation of *Hinds County* is that environmental justice only accounts for a small set of "social factors" like *land use*, proximity to incompatible structures, like churches, and aesthetic aspects of a permitted facility. Permit Board's Brief, pg. 29. Even so, the "proximity" to and the presence of incompatible structures like homes and churches and site specific, subterranean contamination—that the Permit Board insists are necessary to trigger an environmental justice review—were in fact expressed by North Gulfport residents as reasons to not site the Military Project at the North Port Property. [ROA. 45; 77; Admin. ROA. 5; 12; 16-7; 55-6; 132; 142]. Had the Permit Board performed an environmental justice review here, it would have found multiple churches, like Appellant Anointed Temple AOH Church, very near the Military Project. [Admin. ROA 674]. Under the Permit Board's own narrow interpretation of *Hinds County*, an environmental justice review was necessary.

The North Gulfport Communities' concerns deserved consideration in an environmental justice review under the logic of *Hinds County*. The Permit Board and Port Authority ignore the very real environmental and social impacts the § 401 WQC at issue will have on North Gulfport. The Permit Board and Port Authority's attempts to distinguish the § 401 WQC at issue from the solid waste permit in *Hinds County* are therefore unconvincing and without merit. For these reasons and those previously expounded upon in EEECHO et al.'s principal brief, the Permit Board should be required to conduct an environmental justice review of the impact of water quality on vulnerable communities like North Gulfport when the Permit Board administers water quality certifications. Because the Permit Board failed to comply with the jurisprudence of the Mississippi Supreme Court and conduct such a review for the § 401 WQC at issue, the matter must be remanded.

## CONCLUSION

The Permit Board failed to carry out its statutory duties and in doing so failed to consider, analyze, or notice the possibility of explosive ammunition storage at the North Port Property and the effects such storage may have on water quality. In addition, the Permit Board has not provided this Court with a rational basis on which its alternative analysis could possibly have been based. Finally, the Permit Board has a duty to consider environmental justice when administering water quality certifications—an extension of the Mississippi Supreme Court's decision in *Hinds County* that applies the same rationale to water quality certifications as was applied to the siting of a

landfill. This Court should remand this matter back to the Permit Board for consideration of the above issues.

THIS 29th day of June 2023.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Joshua Tom, hereby certify that I electronically filed the foregoing document with the Clerk of the Court using the MEC system which sent notification of such filing to all counsel of record on this 29th day of June 2023.

A true and correct copy has also been sent by U.S. Mail to the Honorable Judge James B. Persons, Harrison Chancery Court, P.O. Box 457, Gulfport, Mississippi, 39502 on this 29th day of June 2023.

*/s/ Joshua Tom*
Joshua Tom

*Counsel for Appellants*