SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2758-21
A-2804-21

IN THE MATTER OF
REAUTHORIZATION OF THE
FRESHWATER WETLANDS
GENERAL PERMIT #1 AND
PERMIT MODIFICATIONS.

Argued May 6, 2024 – Decided June 7, 2024

Before Judges Sabatino, Marczyk, and Vinci.

On appeal from the New Jersey Department of Environmental Protection, FWW General Permit #1 No.: 1508-18-0002.1 (FWWl80001); Permit Modification File No(s).: 1500-16-0004.1 (WFD210001); 1508-18-0002.1 (FHA210001 /FHA210002); 1508-18-0002.l (FWW210001).

Michele R. Donato argued the cause for appellants Martha Steinberg, Gamal El-Zoghby, Michael Knight, Ricardo Valdes, Michael Pierro, Michele Pierro, David Fox, Jessie Langford, New Jersey Conservation Foundation and Environment New Jersey.

Daniel A. Greenhouse argued the cause for appellant Save Barnegat Bay (Eastern Environmental Law Center, attorneys; Daniel A. Greenhouse, on the briefs).

Jason Brandon Kane, Deputy Attorney General, argued the cause for respondent New Jersey Department of Environmental Protection (Matthew J. Platkin, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Jason Brandon Kane, Deputy Attorney General, on the brief).

David M. Kahler, Deputy Attorney General, argued the cause for respondent New Jersey Department of Transportation (Matthew J. Platkin, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; David M. Kahler, Deputy Attorney General, on the brief).

PER CURIAM

These two consolidated appeals stem from our November 24, 2021 opinion remanding this environmental permitting dispute to the Department of Environmental Protection ("DEP"). In re N.J. Dep't of Env't Prot. Waterfront Dev. Permit, Nos. A-5525-17, A-2208-18 (App. Div. Nov. 24, 2021) ("November 2021 Opinion"). The litigation concerns an earthen pit known as a Confined Disposal Facility ("CDF")[1] being used by the New Jersey Department of Transportation ("DOT") to store and dry wet material dredged from Barnegat Bay. The dredging is designed to improve and maintain the navigability of waters within the bay.

[1] In the record, the parties refer to the CDF at issue in this case as the "Westecunk CDF" and the "West Creek CDF."

As described in more detail in our November 2021 opinion, the CDF was originally authorized in 1983 by joint permits issued by the United States Army Corps of Engineers (the "Army Corps") and the DEP. November 2021 Opinion, slip op. at 3. Years after the CDF was built, it fell into disrepair. The DOT purchased the CDF site from private owners in July 2006. Ibid.

In 2018, the DEP issued permits to the DOT authorizing the dredging of three State-maintained waterways flowing into the bay, and the rehabilitation and reconstruction of the CDF. Id. at 25-27. The key permit at the core of this dispute is a General Permit #1 ("GP1") authorized under N.J.S.A. 13:9B-23, a provision of the Freshwater Wetlands Protection Act ("FWPA"), N.J.S.A. 13:9B-1 to -30.

The GP1 was founded upon an FWPA regulation, N.J.A.C. 7:7A-7.1(a), which is pivotal to this case. That regulation enables—subject to several important requirements and conditions we examine in Part II of this opinion—the issuance of a GP1 for the repair or replacement of a previously authorized serviceable structure that lawfully existed before July 1, 1988. Simply stated, the DEP has allowed the DOT to "piggyback" its GP1 upon the permits that had been issued in 1983, before the DOT acquired the property.

Appellants are several residents who live across from the CDF and two environmental groups.[2] They assert the ongoing construction and usage of the CDF disturbs local wetlands and threatens endangered species. Although they do not contest the DEP permits insofar as they authorize the dredging of the waterways, appellants contend the permits concerning the CDF are invalid under applicable statutes and regulations.

In challenging the GP1, appellants contend the DEP should have adhered to the more rigorous process for issuing an individual permit under the FWPA. N.J.S.A. 13:9B-23. For this and other reasons, they seek to vacate the permit and cease the ongoing construction and usage of the CDF.

In our November 2021 opinion, we rejected several of the objectors' arguments, id. at 31-36, but discerned potential merit to their arguments that the GP1 does not comport with the criteria of N.J.A.C. 7:7A-7.1(a). Id. at 37-63. Because of those alleged deficiencies within the DEP's decision, we remanded

[2] One appellant (known as the "Dock Road Group" or "DRG") is composed of residents living across from the CDF on Dock Road, joined by two environmental advocacy groups, the New Jersey Conservation Foundation and Environment New Jersey. The other appellant is an environmental advocacy group known as Save Barnegat Bay ("SBB"). Their legal arguments in opposition to the reauthorized GP1 are generally coextensive.

this matter to the DEP, directing it to reconsider the issuance of the GP1 to the DOT.

As detailed in the pages that follow, our November 2021 opinion mandated very specific instructions and queries for the DEP and DOT to address on remand in order to justify the GP1. Alternatively, we noted that the DOT could apply to the DEP for an Individual Permit in lieu of attempting to sustain the GP1.

On remand, the DEP in March 2022 amplified the record and reauthorized the GP1. The objectors now appeal that remand decision. As one of their main arguments, the objectors contend the remand decision fails to cure the problems identified in our November 2021 opinion, and that the GP1 does not meet the criteria of N.J.A.C. 7:7A-7.1(a).

In response, the DEP and DOT—both represented by the Attorney General—contend the remand decision is sound. They argue the continued construction and usage of the CDF is permissible under the regulation, particularly because such activity allegedly does not disturb additional freshwater wetlands.

Having considered this matter a second time, we reverse the issuance of the GP1. As a matter of law, we conclude the DEP and the DOT ("the State

agencies") have misinterpreted the criteria within N.J.A.C. 7:7A-7.1(a) and misapplied them to the facts.

Specifically, as we amplify in Part II of this opinion, the regulation does not allow the GP1 to be hinged upon the earlier 1983 authorizations because: (1) the CDF has been greatly expanded in volume beyond the dimensions originally approved in 1983; (2) the CDF is being used to store dredged materials from multiple waterways beyond the single waterway source authorized in 1983; and (3) the deviations from the 1983 plans are major, not merely "minor."

Because the GP1 does not comport with the regulation on which it was founded, we must vacate it. We do so on terms set forth at the end of this opinion.

I.

We need not repeat here the facts and procedural history of this protracted dispute, which are extensively canvassed in our previous sixty-eight-page November 2021 opinion. We incorporate that history by reference, which is well known to the parties.

We begin the present opinion with a short summary of the matter, as well as an update on the key events that have transpired since our November 2021 opinion.

The 2018 Permits

In 2018, the DEP's Division of Land Use Regulation issued three permits to the DOT's Office of Maritime Resources ("OMR") for two related projects. Id. at 25. One project concerned the maintenance dredging of three State-maintained Ocean County waterways flowing into Barnegat Bay to improve navigation (the "dredging project"). The other project concerned the rehabilitation and reconstruction of a DOT-owned upland earthen pit, known as a CDF, in Ocean County.

The CDF had previously been jointly permitted in 1983 by the Army Corps and the DEP to store the wet dredged material until it eventually dewatered. Reconstruction of the CDF would disturb more than seven acres of freshwater wetlands and almost one-third of an acre of freshwater. Ibid. Various objectors contested the GP1 on appeal to this court.

Our November 2021 Opinion Remanding the Matter

In our November 2021 opinion remanding this matter, we directed the DEP to reconsider its issuance of a GP1 for the CDF project and to make "more specific findings" addressing whether the project met the applicable freshwater wetlands regulations. Id. at 5. We ordered that:

> DEP must (l) address what appears to be the substantial enlargement of the CDF from its 1983 dimensions and

> whether that is an "expansion" disallowed under a General Permit; (2) address whether the CDF as rebuilt in 1983 was subsequently abandoned; (3) address whether depositing dredged material from three waterways rather than one into the CDF is allowed by a General Permit[;] and (4) perform a more fulsome analysis of whether the deviations from the 1983 project are only "minor," giving explicit consideration to the objectors' expert reports.
>
> [Ibid.]

We specified that, while the remand was pending, "the DEP and the DOT shall retain the discretion to reconsider whether a General Permit is the most appropriate permit for this particular situation or, alternatively, whether the submission . . . and consideration . . . of an Individual Permit application . . . would be more suitable and expeditious." Id. at 67.

In so holding, we rejected arguments that the project required a permit under the Coastal Area Facility Review Act, N.J.S.A. 13:19-1 to -21 ("CAFRA"); that the CDF did not qualify as a "currently serviceable structure" under N.J.A.C. 7:7A-7.1(a); and that N.J.A.C. 7:7A-5.7(b)(10) prohibits placing dredged material in freshwater wetlands. Id. at 29-47. We also declined to set aside the GP1 based upon the objectors' arguments concerning: (1) whether threatened and endangered species would be harmed; (2) whether the DOT should use another method or site to manage the dredged material; and (3)

whether residents living near the CDF would suffer from noise, odors, dust, pollution, or other detrimental effects. Id. at 41-42, 68.

With respect to the timing of continued construction of the CDF, we observed "due to habitat cycles and other factors, the dredging and construction activity must stop by December 31, 2021 and cannot resume until July 2022." Id. at 68. However, as to the ongoing viability of the GP1, we stated "[t]he status quo need not be changed at this time, pending the outcome of the remand."[3] Ibid.

Post-November 2021 Additional Dredging and CDF Activities

In January 2022, the DOT informed the DEP in an email that the dredging of Westecunk Creek (up to the municipal marina on Dock Road) started in October 2021 and stopped in December 2021, that the material deposited on the CDF would be "allowed to dewater over the winter," and that allegedly suitable material would be utilized on site, as needed, to bolster and raise the berms. Fish and avian regulatory windows precluded on-site work from April through August. According to the DOT, it was "unknown" at that time when dredging would resume, though "it is anticipated to be at least 5 years." When dredging

[3] Shortly after our November 2021 opinion, on December 28, 2021, we granted the DEP's request to consider minor technical modifications to the GP1. Those minor modifications are not germane to the present appeal.

eventually did restart, the DOT anticipated it would include completion of Westecunk Creek as well as the Cedar Run and Parkers Run waterways.[4]

The DOT further advised the DEP it had "no plans to excavate material" from the CDF, and that it had "considered the concept of beneficial use of the material 'on-site' at the eastern end of the CDF to restore land and beach areas as well as provide potential flood mitigation during storm events."

The DEP Receives More Information and Considers Public Comments

In December 2021, the DEP requested additional information from the DOT on the regulatory issues raised by this court. The DOT responded with information which the DEP transmitted to appellants and all interested parties, accompanied by notice of a thirty-day public comment period. Appellants and other members of the public submitted comments to the DEP, which were shared with the DOT.

In its own comments, appellant SBB objected to traditional dewatering of the CDF site, asserting that "recent material factual developments

[4] At oral argument on the present appeals in May 2024, however, the Attorney General represented that the dredging of Westecunk Creek and Parkers Run had been completed as of November 2022. The Attorney General further represented that the dredging of Cedar Run has been indefinitely suspended, although there has been no formal memorialization of that suspension. The Attorney General advised that present activities within the CDF include grading operations and the opening of plastic bags employed in the dewatering process.

demonstrate[d] that beneficial reuse is the preferred alternative to CDF sites and [the] DOT should adhere to this approach in this matter."

SBB further asserted the DEP must require a habitat impact assessment from the DOT before the project proceeds. According to SBB, the DOT needs to demonstrate in a "complete or robust" habitat impact assessment "that endangered or threatened wildlife or plant species habitat [will] not directly or through secondary impacts on the relevant site or in the surrounding area be adversely affected."

In its own comments, appellant DRG reiterated its objections to any reauthorization of a GP1, and asked for a public hearing on the reconsideration. DRG also provided various exhibits with its comments, including a 2016 expert report by G. Fred Lee and Associates (the "Lee Report") and a February 2022 "Review of Material relevant to NJDOT's Proposed Construction of the West Creek CDF" by Mark Gallagher of Princeton Hydro, LLC (the "Gallagher Report").[5]

Gallagher asserted in his report, after inspecting the CDF site several times, that "[d]ue to the failure of the eastern berm . . . and years of neglect [and

[5] In our November 2021 opinion, we directed the DEP on remand to "expressly consider the opinions of appellants' expert in the Lee Report." Id. at 67. The Gallagher Report was issued after our opinion.

lack of maintenance,] the wetlands within the remnants of the former CDF would . . . satisfy the definition of a coastal wetland and may have for some time." He therefore concluded that a freshwater wetlands Individual Permit was required for the CDF project because the project did not meet the criteria for a GP1 and because DOT was essentially enlarging a "derelict CDF last used in 1983 and then forgotten for the past 37 years."

In March 2022, the DOT filed its responses to the public comments. The DOT stated that the materials submitted by objectors in their public comments should have been provided when the DEP first considered the 2018 permit application.

The DOT also asserted that the elevations of the berms, as constructed, would not matter because, "[a]s the DEP is aware, the height of the CDF's berms can be variable within the limits of a proposed final elevation, to manage and maintain the practical function of the CDF." The DOT asserted "any widening or narrowing of the berms occurs by changing the toe of the slope on the interior of the CDF." Accordingly, the DOT claimed it "built the CDF consistent with the [GP1's] material terms."

Finally, the DOT rejected any need to address, as advocated by the objectors, any "beneficial reuse strategies," asserting they were irrelevant to the

issues the court directed the DEP to clarify on remand. The DOT contended that, although it was "well-aware of the concept of beneficial use of dredged material," "[n]o project-level opportunities exist here" because the permitting process for FWPA general permits, unlike for individual permits, does not require such analyses of alternatives.

The DEP's March 31, 2022 Supplemental Analysis

After the public comment period ended and the DOT's responses had been submitted, the DEP simultaneously issued two documents on March 31, 2022, which completed the remand. In one document, Janet Stewart, Section Chief, and Suzanne U. Biggins, Supervising Environmental Specialist, both of the DEP's Bureau of Coastal Permitting, Division of Land Resource Protection, issued an "Environmental Report: Supplemental Analysis," and separate responses to public comments.

Among other things, the DEP's Supplemental Analysis concluded the CDF property was "previously authorized" as a CDF in 1983 and has never been put to any other use. According to the DOT, the CDF has been identified and listed, since 1995, as a dredged material disposal site in an index maintained by the State's navigation channel dredging program.

The DEP reviewed the CDF's permitting history, noting that the DEP and the Army Corps had jointly permitted the 1983 activities, and that the DOT had received permits to place dredged material in the CDF in 2011, and again in 2018. For the current proposal, the DEP determined that an Individual Permit is—in its view—not required because there are no permanent disturbances to freshwater wetlands proposed by the CDF rehabilitation.

The DEP further stated in the Supplemental Analysis that it had considered and rejected the opinions in the Lee and Gallagher reports produced by appellants. According to the DEP, the Lee Report would not impact any permitting decision because it allegedly did not analyze the DOT's final submitted 2018 plans for the CDF project and did not use the most recent Army Corps guidance.

Nevertheless, the DEP analyzed each of the five characteristics listed in the Lee Report to prove an "existing" CDF: (1) adequate berms; (2) groundwater quality protection; (3) adequate buffer lands; (4) public health/welfare and aesthetic quality; and (5) adequate roads. In so doing, the DEP determined, contrary to the Lee Report's findings, there are existing berms on the CDF property, even though they require rehabilitation, and that the groundwater level

is sufficiently deep to protect the aquifer by providing "adequate natural protection."

The DEP also concluded that the conditions imposed on the permits for controlling noise, odor, and traffic, were consistent with the mitigation measures enlisted by the Army Corps for protecting public health and welfare, aesthetic quality, and adequate buffer lands. Further, the DEP concluded that Dock Road was adequate for the DOT's construction equipment and potential removal of dredged material from the CDF.

As for alternative locations for disposal of materials from the dredging project, the DEP noted the CDF was centrally located to the channels and close enough so that a small diameter hydraulic pipeline dredge could be used during the dredging. It deemed the site as "the least cost environmentally acceptable alternative," and found no other State-owned and available CDF facilities within a five-mile radius.

The DEP rejected Gallagher's opinion that the CDF project was not eligible for a GP1 under the FWPA. The DEP concluded the CDF project met all of the criteria for a GP1, noting this court had already determined that the CDF was currently serviceable and that the project needed no CAFRA permit.

The DEP's March 31, 2022 Reauthorization of the GP1

Concurrent with the Supplemental Analysis, on March 31, 2022, DEP Section Chief Stewart issued a final agency decision reauthorizing the GP1.[6] The decision declared that the DEP "has considered the submitted comments and has completed its reevaluation of the projects' compliance with the Freshwater Wetlands [GP1] and minor technical modifications and has decided to reauthorize the . . . permit and modifications to NJDOT, OMR for the reconstruction of the West Creek CDF." Notice of the reauthorization was published in the "DEP Bulletin" on April 6, 2022.

The Present Appeal

The present appeals by DRG (No. A-2758-21) and SBB (No. A-2804-21) ensued. The appeals were consolidated. Fundamentally, appellants contend the issuance of the GP1 still has not been justified, and that the 1983 authorizations do not support the continued permitting.

II.

The pivotal issue that requires our close analysis—and which compels reversal of the DEP's legally erroneous and arbitrary decision on remand—concerns the interpretation and application of a freshwater wetlands regulation:

[6] We note this timing adhered to the March 31, 2022 deadline for completion of the remand, as set forth in our November 2021 opinion. Id. at 68.

N.J.A.C. 7:7A-7.1(a). Before we analyze the regulation, we reiterate some context about the statutory scheme that we previously described in our November 2021 opinion. Slip op. at 37-42.

A.

The DEP's responsibilities concerning freshwater wetlands include adopting various types of general permits to allow certain regulated activities, and then issuing those permits for those activities. N.J.S.A. 13:9B-23. If the proposed activities do not qualify for a general permit under one of the categories in N.J.S.A. 13:9B-23(c), the activities can still take place in the freshwater wetlands if the applicant submits an application for approval of an individual permit pursuant to N.J.S.A. 13:9B-9 and N.J.S.A. 13:9B-13.[7]

Pursuant to the FWPA, the DEP is authorized to adopt general permits for any Nationwide Permit previously approved under the Clean Water Act ("CWA") by the Army Corps, and for activities in a freshwater wetland that is

[7] See In re Freshwater Wetlands Gen. Permit No. 16, 379 N.J. Super. 331, 335 (App. Div. 2005) (stating, "if a general permit did not apply," the proposed regulated activities, "could still be approved under an individual permit"); In re Authorization for Freshwater Wetlands Gen. Permits, 372 N.J. Super. 578, 582 n.2 (App. Div. 2004) ("Compared to a general permit, individual permits require the applicant to meet more demanding standards and requirements."). See also N.J.A.C. 7:7A-9.1 ("A person shall obtain an individual permit . . . to undertake any activity that does not meet the requirements of . . . an authorization under a general permit").

not a surface water tributary system discharging into an inland waterway and which would not result in the loss or substantial modification of more than one acre of freshwater wetland. N.J.S.A. 13:9B-23(a) and (b). The DEP can also adopt general permits for certain enumerated categories of activities if it determines that:

> the activities will cause only minimal adverse environmental impacts when performed separately, will have only minimal cumulative adverse impacts on the environment, will cause only minor impacts on freshwater wetlands, will be in conformance with the purposes of [the Act], and will not violate any provision of the [CWA.]
>
> [N.J.S.A. 13:9B-23(c).]

The enumerated categories of N.J.S.A. 13:9B-23(c) include:

> (9) Maintenance, reconstruction, or repair of buildings or structures lawfully existing prior to the effective date of [the FWPA] or permitted under [the FWPA], provided that these activities do not result in disturbance of additional freshwater wetlands upon completion of the activity.
>
> [N.J.S.A. 13:9B-23(c)(9).]

Accordingly, in its FWPA implementing regulations, N.J.A.C. 7:7A-1.1 to -22.20, the DEP adopted the GP1 permit category for those activities meeting the requirements in N.J.S.A. 13:9B-23(c)(9).

B.

Specifically governing GP1s, N.J.A.C. 7:7A-7.1(a)—the pivotal regulation at the heart of these appeals—states in full:

> (a) General permit 1 authorizes activities in freshwater wetlands and State open waters required to carry out the repair, rehabilitation, replacement, maintenance, or reconstruction of a previously authorized, currently serviceable structure, fill, roadway, utility line, active irrigation, or drainage ditch, or stormwater management facility lawfully existing prior to July 1, 1988, or permitted under this chapter, provided all applicable requirements at N.J.A.C. 7:7A-5.7 and 20.3 are met and:
>
> > 1. The previously authorized structure, fill, roadway, utility, ditch, or facility has not been and will not be put to any use other than as specified in any permit authorizing its original construction; and
> >
> > 2. The activities do not expand, widen, or deepen the previously authorized feature, and do not deviate from any plans of the original activity, except that minor deviations due to changes in materials or construction techniques and which are necessary to make repairs, rehabilitation, or replacements are allowed, provided such changes do not result in disturbance of additional freshwater wetlands or State open waters upon completion of the activity.
>
> [N.J.A.C. 7:7A-7.1(a).]

Tracking this court's remand instructions to the DEP, appellants argue that the CDF project was not eligible for the reauthorized GP1 because the proposed activities: (1) do not satisfy N.J.A.C. 7:7A-7.1(a) as the CDF had been abandoned and was not "lawfully existing" prior to July 1, 1988; (2) will "expand" the previous CDF authorized in 1983, contravening N.J.A.C. 7:7A-7.1(a)(2); (3) will put the previous CDF to a "use other than as specified" in the original authorizations, in conflict with N.J.A.C. 7:7A-7.1(a)(1); and (4) constitute major deviations from the CDF's original permitted use, against N.J.A.C. 7:7A-7.1(a)(2).

In evaluating these arguments concerning the regulation, we are guided by familiar principles of appellate review. Our courts are generally "obliged to give due deference to the view of those [administrative agencies] charged with the responsibility of implementing legislative programs." In re Adoption of Amends. to N.E., Upper Raritan, Sussex Cnty. & Upper Del. Water Quality Mgmt. Plans, 435 N.J. Super. 571, 583 (App. Div. 2014) (quoting In re N.J. Pinelands Comm'n Resol., 356 N.J. Super. 363, 372 (App. Div. 2003)). Such judicial deference "stems from the recognition that agencies have the specialized expertise necessary to . . . deal[] with technical matters and are 'particularly well equipped to read and understand the massive documents and to evaluate the

factual and technical issues.'" Ibid. (alteration in original) (quoting N.J. State League of Muns. v. Dep't of Cmty. Affs., 158 N.J. 211, 222 (1999)). Our courts largely defer to an agency in cases involving technical matters within the agency's special expertise. Freshwater Wetlands Gen. Permits, 372 N.J. Super. at 593.

Nonetheless, "[a]n appellate court may reverse an agency decision if it is arbitrary, capricious, or unreasonable." In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp., 216 N.J. 370, 385 (2013).

> [A]lthough sometimes phrased in terms of a search for arbitrary or unreasonable agency action, the judicial role [in reviewing an agency action] is generally restricted to three inquiries: (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
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> [Id. at 385-86 (quoting Mazza v. Bd. of Trs., Police & Firemen's Ret. Sys., 143 N.J. 22, 25 (1995)).]

Moreover, our appellate courts exercise de novo review of questions of law, such as the interpretation of the meaning of statutes and regulations of administrative agencies. To be sure, "[a]n administrative agency's interpretation

of statutes and regulations within its implementing and enforcing responsibility is ordinarily entitled to our deference." Wnuck v. N.J. Div. of Motor Vehicles, 337 N.J. Super. 52, 56 (App. Div. 2001) (alteration in original) (quoting In re Appeal by Progressive Cas. Ins. Co., 307 N.J. Super. 93, 102 (App. Div. 1997)).

However, despite that general deference to the agency's interpretations, we are not bound by them. In re N.J.A.C. 7:1B-1.1 et seq., 431 N.J. Super 100, 114 (App. Div. 2013). "While we must defer to the agency's expertise, we need not surrender to it." N.J. Chapter of Nat'l Ass'n of Indus. & Office Parks v. N.J. Dep't of Env't Prot., 241 N.J. Super. 145, 165 (App. Div. 1990). We therefore do not automatically accept an agency's interpretation of a statute or a regulation, and we review strictly legal questions de novo. Bowser v. Bd. of Trs., Police & Firemen's Ret. Sys., 455 N.J. Super. 165, 170-71 (App. Div. 2018).

As we noted in this regard in our November 2021 opinion:

> When interpreting a regulation, we are guided by the same general principles as we are when interpreting a statute. In re Eastwick College LPN-RN Bridge Program, 225 N.J. 533, 542 (2016); [US Bank, N.A. v. Hough, 210 N.J. 187, 202 (2012).] The main objective is to determine the intent of the drafter, which is most often found in the plain language of the regulation. [In re Eastwick College LPN-RN Bridge Program, 225 N.J. 533, 542 (2016).] If the plain language does not clearly manifest the drafter's intent, we are permitted to use

> extrinsic sources to determine the meaning. Ibid. (citing US Bank, 210 N.J. at 199).
>
> [Slip op. at 43.]

C.

Applying these principles of review—that focus, first and foremost, on the "plain language" of a codified provision—we conclude the March 2022 reauthorization of the GP1 must be vacated because it is based on a legally incorrect and arbitrary interpretation of N.J.A.C. 7:7A-7.1(a). Here is why.

We have already quoted above the entire text of the regulation. To best understand its meaning, we unpack in segments the words it contains.

We begin with the prefatory portion of N.J.A.C. 7:7A-7.1(a), which precedes subsections (1) and (2). That preface, with emphasis added, reads:

> (a) General permit 1 authorizes activities in freshwater wetlands and State open waters required to carry out the repair, rehabilitation, replacement, maintenance, or reconstruction of a previously authorized, currently serviceable structure, fill, roadway, utility line, active irrigation, or drainage ditch, or stormwater management facility lawfully existing prior to July 1, 1988, or permitted under this chapter, provided all applicable requirements at N.J.A.C. 7:7A-5.7 and 20.3 are met and:

The underscored language in the preface first specifies that the activities under the GP1 must be required to "carry out the repair, rehabilitation,

replacement, maintenance, or reconstruction of a previously authorized, currently serviceable structure . . . ." As for this predicate, we agree with the DEP and the DOT that the DOT's activities on the site are being carried out to repair, rehabilitate, replace, maintain, or reconstruct the CDF.

We reject appellants' contention that the CDF had been abandoned, which was a discrete issue we remanded in our November 2021 opinion. Slip op. at 52-56. Although a private owner sought to pursue development of the site for housing subsequent to acquiring the property after 1983 and before selling it to the DOT in 2006, that commercial plan never went forward. The CDF was in a relatively dormant status during that interval, but it was not abandoned and put to a different use.

The record does not show that the previous owners or the DOT exhibited "an intention to abandon" the usage of the CDF. S & S Auto Sales, Inc. v. Zoning Bd. of Adjustment for Borough of Stratford, 373 N.J. Super. 603, 613-14 (App. Div. 2004). Nor is there an "overt act or failure to act" that sufficiently demonstrated that they did not retain "any interest in the subject matter of the abandonment." Ibid. We concur with the DEP's analysis of the abandonment issue, as detailed in its Supplemental Analysis.

The next clause of the regulation's preface ("a previously authorized, currently serviceable structure") presents a closer issue. It is undisputed that the CDF was "previously authorized" under the permits jointly issued by the DEP and the Army Corps in 1983. But the parties continue to dispute whether the CDF was "currently serviceable" when the DOT applied for the GP1 in 2014. The DEP concluded that it was, and we agreed with that assessment in our November 2021 opinion, based on the record then presented to us. Slip op. at 43-47.

We recognize that one wall of the CDF had eroded by the time the DOT submitted its permit application. That prompted the need to restore it. Even so, the record suggests that, despite its deteriorated wall, the CDF was still storing some dredged material. The preface of N.J.A.C. 7:7A-7.1(a) encompasses the "repair" and "rehabilitation" of a preexisting structure or facility, signaling the structure or facility can be damaged to meet this criterion. Although the question is not free from doubt, we once again conclude this portion of the preface is met.

The next underscored portion of the preface ("lawfully existing prior to July 1, 1988") is clearly satisfied by the 1983 permits.

We now turn to subsections (1) and (2). We begin that examination by noting they are separated by the connector "and"—grammatically signifying in the conjunctive that both (1) and (2) must be satisfied. "[T]he word 'and' carries with it natural conjunctive import while the word 'or' carries with it natural disjunctive import." Pine Belt Chevrolet, Inc. v. Jersey Cent. Power & Light Co., 132 N.J. 564, 579 (1993) (quoting State v. Duva, 192 N.J. Super. 418, 421 (Law Div. 1983)). As we will now discuss, the GP1 fails, as is necessary, to meet all of the requirements of both of these provisions.

Subsection (1) of N.J.A.C. 7:7A-7.1(a) reads (with text we have underscored) as follows:

> 1. The previously authorized structure, fill, roadway, utility, ditch, or facility has not been and will not be put to any use other than as specified in any permit authorizing its original construction; and . . . .

As we noted above, the CDF was "a previously authorized structure" under the 1983 permits. However, subsection (1) requires that the structure "will not be put to any use other than as specified in any permit authorizing its original construction . . . ." (emphasis added). The term "any" plainly rules out other uses.

Here, the 1983 permits only authorized the CDF to store dredged spoils from the Westecunk Creek. The GP1 exceeds that by allowing the CDF to store material from two additional waterways, Parkers Run and Cedar Run. As represented to us at oral argument, the dredging of Parkers Run is now complete. That comprises "any use" that exceeds the single-waterway terms of the 1983 permits. It is inconsequential the DOT, at present, has elected to suspend its dredging of Cedar Run. The GP1 would allow such dredging to resume. Hence, subsection (1) is not met.[8]

We next turn to subsection (2) of N.J.A.C. 7:7A-7.1(a), which reads (with emphasis added):

> 2. The activities do not expand, widen, or deepen the previously authorized feature, and do not deviate from any plans of the original activity, except that minor deviations due to changes in materials or construction techniques and which are necessary to make repairs, rehabilitation, or replacements are allowed, provided such changes do not result in disturbance of additional freshwater wetlands or State open waters upon completion of the activity.

[8] A simple analogy can illustrate the point. If Alice authorizes her next-door neighbor Bob to use her backyard swimming pool, that doesn't mean Alice also authorizes her two other neighbors, Chris and Dana, to use the pool as well. Those additional users go beyond the scope of Alice's authorization, even though the nature of their use (i.e., swimming) may be the same.

The GP1 violates this subsection in multiple ways.

First, the GP1 allows the CDF to be "expanded" greatly in volume. The record shows that the dredge spoils from the previous permit, consisting of 52,233 cubic yards deposited in 1983, were projected to be increased nearly five times under the GP1, with a deposit of 259,319 cubic yards projected for 2022. And, as we noted above, the dredge spoils were deposited from only one authorized waterway in 1983, whereas the GP1 would authorize the deposit of dredge spoils from three waterways in 2022.

Second, the GP1 allows the CDF to "deviate" from the previously authorized features, and to do so in major, not minor, ways. Even if we accept the premise that "changes in materials or construction techniques" necessitate the CDF's rehabilitation or repair, the changes are of a magnitude and nature that cannot reasonably be deemed minor. We are unpersuaded by the argument that both the 1983 and 2016 permits essentially allowed "dredging and disposing" and that it did not matter how much was dredged or from where, or how much was disposed.

As a further textual point, we note subsection (2)'s clause about minor deviations is connected to the "expand, widen, or deepen" clause with the conjunctive term "and." Pine Belt Chevrolet, 132 N.J. at 579. Hence, even if,

for the sake of discussion, we were to regard the deviation as minor, the violation of the "expand" prohibition persists.

Third, we reject the State agencies' new legal argument they did not raise in the previous appeal: that subsection (2)'s final proviso (i.e., "provided such changes do not result in disturbance of additional freshwater wetlands or State open waters upon completion of the activity") overrides the requirements of the rest of the regulation appearing above it. The State agencies misread the import of the proviso.

It has long been recognized in the law that "[i]t is not the function of a proviso to enlarge the enacting clause [of a code] or confer a power." N.J. State Bd. of Optometrists v. S.S. Kresge Co., 113 N.J.L. 287, 296 (Sup. Ct. 1934). A proviso is "a limitation of, or exception to, the authority conferred." Ibid.

The proviso invoked here by the State agencies simply adds another limitation to the term "such changes," which appears a few lines earlier in subsection (2). Textually, those changes refer to changes in "materials or construction techniques."

Even if, as the State agencies contend, the continued use and posited reconstruction of the CDF will not disturb more freshwater wetlands—a point that we recognize appellants dispute—that non-disturbance does not excuse the

aforesaid requirements of N.J.A.C. 7:7A-7.1(a) disallowing "any other use" and "expansion" and "major" deviation.[9]

D.

In sum, the State agencies' strained interpretation of the controlling regulation fails as a matter of law. The permit must be vacated, without prejudice to an application for an Individual Permit. If such an Individual Permit is pursued, the harms to wildlife and the environment alleged by appellants can be addressed in that more extensive process. In light of this invalidation, we need not address any other challenges raised by appellants.

Our ruling is effective in thirty days. If the State agencies file a petition for certification and a motion for a stay with the Supreme Court during that interval, the effective date will be automatically extended until such time as the Court may act or otherwise prescribe.

We do not address whether our invalidation of the GP1 will require any remedial or restorative action to address or rectify any adverse environmental impacts that may have been caused while the GP1 was effective. Any requests

[9] At the very least, the proviso, which is lodged in subsection (2), does not affect the "any other use" requirement of subsection (1).

for such remedial or restorative action shall be presented to and decided in the first instance by the State agencies.

Permit vacated. We do not retain jurisdiction.