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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge

Appellate Case No. 2010-155629

Kiawah Development Partners, II,..Respondent,
v.
South Carolina Department of Health and Environmental Control,....................Appellant.
and
South Carolina Coastal Conservation League, ...Appellant,
v.
South Carolina Department of Health and Environmental Control and
Kiawah Development Partners, II, of whom South Carolina Department
of Health and Environmental Control is .... Appellant,

and Kiawah Development Partners, II, is ....Respondent.

RESPONSE OF APPELLANT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL TO BRIEF OF AMICUS CURIAE

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South Carolina Department of Health and Environmental Control ("DHEC" or "the Department") responds here to the Amicus Brief of the Savannah River Maritime Commission ("SRMC" or "Maritime Commission"). The Department is addressing only cases raised in the Amicus Brief. The Maritime Commission seeks the Court's clarification of the applicable framework for addressing agency deference in contested case hearings before the ALC and subsequently at the appellate level, and clarification from the Court as to the appropriate analysis for the scope of agency authority.

ARGUMENTS IN RESPONSE

I. DEFERENCE IS GIVEN TO THE AGENCY CHARGED BY THE GENERAL ASSEMBLY WITH AUTHORITY TO ENFORCE AND ADMINISTER STATUTES AND REGULATIONS

The deference given to an administrative agency's interpretation of the statutes and regulations it administers and enforces is well settled in South Carolina. Deference is given to the agency which has been delegated administrative and enforcement authority by the General Assembly. In South Carolina, it is settled that "[a]s a general rule, 'agencies charged with enforcing statutes ... receive deference from the courts as to their interpretation of those laws.' Thus, the reviewing tribunal will defer to the relevant administrative agency's decision unless there is a compelling reason to differ." *Savannah Riverkeeper v. S.C. Department of Health and Environmental Control*, 400 S.C. 196, 733 S.E.2d 903 (2012).

While the Court may reference an "error" or "erroneous interpretation" as compelling reason, cases decided by this Court overwhelmingly rest on the agency's interpretation being contrary or inconsistent with the "plain language" or "plain intent" of

the statute or regulation as the compelling reason not to give deference to the agency. It is clear that the agency given deference by the Court is the agency charged with administering and enforcing the applicable statute or regulation. Also, a longstanding agency position is an additional basis for following the agency's interpretation, but it is not a condition for deference. Ambiguity in reference to new or developing law enforced by the agency would properly give rise to deference.

Where the language of the statute or regulation is ambiguous, the administrative agency, such as DHEC, is given deference. When reasonable minds can reach differing interpretations, the agency's reasonable interpretation and construction of the statutes and regulations it administers and enforces is entitled to deference by appellate courts and the Administrative Law Court.

II. THE ROLES OF THE AGENCY AND ADMINISTRATIVE LAW COURT ARE VERY DIFFERENT

As the Amicus Brief states, it is the Administrative Law Court that has been delegated quasi-judicial adjudicatory functions. When the ALC conducts a hearing, the case is tried as if no trial had been had in the first instance. Thus, it is stated that the ALC sits *de novo* in a contested case, conducting an evidentiary hearing and making findings of fact. However, the General Assembly did not delegate policy making, regulatory or permitting functions to the ALC. Those functions remain at the core of an administrative agency's delegated responsibility and authority.

It is not correct that "in the administrative process, the ALC has the same authority to impose terms and conditions and works within the same parameters as the agency for which it is conducting the contested case hearing." Amicus Brief, p. 6. In a contested case, the ALJ, like a trial court, must confine his inquiry to the evidentiary

record made at the hearing and render a decision based on the preponderance of evidence bought forth by Petitioners at a hearing. The scope of inquiry and decision making at the agency is much broader. The administrative record and decision are not constrained by evidentiary rules and limitations.

The agency permitting decision being contested at the ALC stands unless a Petitioner meets the burden of proving the claims it raises to overturn or change a decision by a preponderance of the evidence. *See* SC Code Ann. § 1-23-600(A)(5) (Supp. 2012).[1] The preponderance of evidence standard at the contested case evidentiary hearing, as opposed to just the substantial evidence standard, ensures that the agency decision is not rejected freely or without sufficient evidence. While an ALJ's findings of fact will ultimately be reviewed under the substantial evidence test, the ALJ may only reject or modify an agency permit decision based on findings of fact that are supported by the preponderance of evidence.

CONCLUSION

The administrative agency and the Administrative Law Court have essential and separate functions. The administrative agency is entitled to great deference in the reasonable interpretation of statutes and regulations it administers by delegation of the General Assembly, unless contrary to the plain language or intent of the law. The Administrative Law Court sits *de novo* in conducting contested case hearings, making evidentiary records, and making findings of fact based upon the preponderance of evidence on the matters before it. The roles in this case are no different and should be carefully followed given the significance and impact of the issues before the Court.

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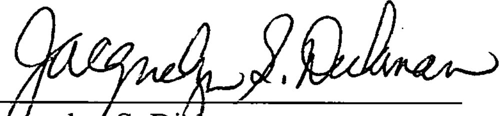
[1] ALC Rule 15 places the burden of proof on the agency in enforcement cases.

Respectfully submitted,



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June 12, 2013

Columbia, South Carolina

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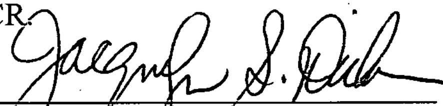
CERTIFICATE OF COUNSEL

The undersigned counsel certifies that this Response to the Amicus Curiae Brief complies with Rule 211(B) and Rule 213, SCACR.



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CERTIFICATE OF SERVICE

I, Sandra R. Wessinger, for the South Carolina Department of Health and Environmental Control, hereby certify that I have on this 12th **day of June, 2013,** served a copy of ***Appellant South Carolina Department of Health and Environmental Control's Response to Amicus Curiae Brief*** upon all parties and counsel of record in the above-captioned case, via United States Mail, First Class, postage prepaid, addressed as follows:

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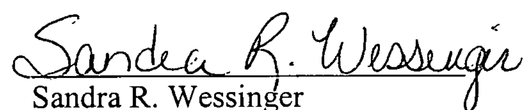
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