

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Case No. 08-ALC-07-0425-CC

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S.C. Supreme Court

Engaging and Guarding Laurens County's Environment ("EAGLE") Petitioner,

vs.

South Carolina Department of Health and Environmental Control
and MRR Highway 92, LLC, Defendants,

of whom MRR Highway 92, LLC, is Respondents.

**BRIEF OF PETITIONER ENGAGING AND
GUARDING LAURENS COUNTY'S ENVIRONMENT**

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STATEMENT OF ISSUES ON APPEAL

- I. **Did the Court of Appeals Err in Overturning the Administrative Law Court's Order Concluding That There Is No Need for the Proposed Landfill Based on the Existing Excess Permitted Landfill Capacity Within the Vicinity of the Proposed Landfill, Where the Plain Language of the Act Requires a Landfill Applicant to Make a "Demonstration of Need" for a New Landfill?**

- II. **Did the Court of Appeals Err in Giving Deference to the Department's Interpretation of Regulation 61-107.17 Where That Interpretation Is Contrary to the Plain Language of the Regulation and Section 44-96-290(E) of the Solid Waste Policy and Management Act, Which Requires a Landfill Applicant to Demonstrate "Need" for a New Landfill?**

- III. **Did the Court of Appeals Err in Giving Deference to the DHEC Staff Decision Given That the Staff Abused its Discretion in Failing to Apply the "Additional Factors" Section of Regulation 61-107.17.D.(3)(d)?**

- IV. **Was the DHEC Decision to Grant a Demonstration of Need Arbitrary and Capricious in That It Failed to Consider Additional Factors, Such as the Fact That the Tri-County Planning Area Already Has Enough Existing Landfill Capacity to Meet its Generation Rates and is Utilizing Less than 30% of the Permitted Capacity, and That It Failed to Provide Any Basis for Deciding Not to Consider These or Any Other Additional Factors?**

STATEMENT OF THE CASE

This case began as an application submitted by MRR Highway 92, LLC (“MRR”), for a solid waste management permit from the South Carolina Department of Health and Environmental Control (DHEC) for a Construction & Demolition (“C & D”) landfill. C & D landfills, also known as Type II landfills, are regulated pursuant to the South Carolina Solid Waste Policy and Management Act (the “Act”), S.C. Code Ann. §§ 44-96-10, *et seq.*, which requires permits for all solid waste management facilities. MRR requested permission to construct and operate a commercial C& D landfill in Laurens County for the disposal of construction, demolition and land-clearing debris.

The DHEC staff announced its decision to issue the requested permit on July 18, 2008. (App. 407-414). On July 24, 2008, the DHEC staff gave notice of its decision to approve a storm water plan for the proposed landfill. On August 4, 2008, Engaging and Guarding Laurens’ Environment (“EAGLE”) filed its Request for Final Review Conference with the DHEC Board, seeking review of the staff decisions. (App. pp. 807-812). The Clerk of the DHEC Board informed EAGLE that it was declining the request for Board review by letter dated August 21, 2008. (App. pp. 813-14).

On September 16, 2008, EAGLE filed its Request for Contested Case Hearing in the Administrative Law Court. (App. pp. 815-822). The case was assigned to Administrative Law Judge Ralph King Anderson, III. On March 17, 2009, MRR filed a motion for partial summary judgment on all issues relating to the solid waste facility permit. (App. pp. 441-444), and MRR also filed a motion to make more definite and certain with respect to EAGLE’s allegations relating to the storm water permit. (App. pp. 553-573). On May 1, 2009, EAGLE filed a motion for summary judgment and response

to MRR's motions, and at the same time withdrew all of its grounds for appeal except for issues "relating to the need for this landfill, the validity of Regulation 61-107.17, the requirements of Section 44-96-290(E) of the Solid Waste Management Act, and the manner in which the Act and regulations have been applied in determining the issue of need in this case." (App. 574-713).

On May 27, 2009, the ALC heard the cross motions for summary judgment. On July 22, 2009, the ALC conducted a hearing on the merits.

On August 7, 2009, the ALC issued two orders denying both motions for summary judgment. (App. 7-16; R. pp. 6-15). On October 29, 2009, the ALC issued its Final Order and Decision, finding and concluding that the proposed landfill is not needed and thus reversing the Department's decision to issue the permit to MRR. (Appendix pp. 965-973). The Administrative Law Judge found and concluded that the tri-county planning area for the proposed landfill was utilizing less than 30% of its permitted capacity and that MRR did not make a "demonstration of need," and he thus ordered that the permit to construct the proposed landfill be denied. (Appendix, pp. 970-971).

MRR Highway 92 filed an appeal in the Court of Appeals on November 13, 2009. The Court of Appeals heard oral arguments on May 3, 2011, and issued a one-page, unpublished *per curiam* Opinion on August 4, 2011, reversing the Administrative Law Judge's Order. (App. pp. 992-983). The Court of Appeals stated "[w]e reverse the decision of the ALC and reinstate the decision of the Department because the Department acted within its discretion by declining to consider additional factors in issuing a demonstration of need to MRR." (Appendix, p. 993).

EAGLE filed a Petition for Rehearing on August 18, 2011 (Appendix p. 974-

982). The Court of Appeals issued an Order Denying Petition for Rehearing on September 22, 2011. (Appendix pp. 994-995).

EAGLE then filed a Petition for Certiorari before this Court on October 24, 2011, seeking review the Court of Appeals Opinion in *EAGLE v. SCDHEC and MRR Highway 92, LLC*, Unpub. Op. No. 2011-UP-380 (August 4, 2011).

ARGUMENT

Summary of Argument

At issue in this case is whether there is a “need” for MRR’s proposed landfill, as required under Section 44-96-290(E) of the Solid Waste Management Act, and the manner in which the Act and regulations have been interpreted and applied in determining the issue of need in this case. Of particular relevance is Regulation 61-107.17 (D)(3)(d), which directs to consider “additional factors” in making its determination of need.

The Administrative Law Judge concluded that it is “obvious the General Assembly intended that t demonstration of ‘need’ must involve some proof that the circumstances within the region of the landfill indicate additional capacity is needed to meet the public’s demands.” (App. pp. 970-971, ALC Order, pp. 6-7).

In its one-page, *per curiam* Opinion, the Court of Appeals overlooks the ALC’s conclusion that under S.C. Code Ann. § 44-96-290(E), “need” in the plain and ordinary meaning of the word requires some proof that additional landfill capacity is needed; fails to identify any basis for overturning the ALJ’s application of the regulations in a manner that is consistent with § 44-96-290(E) of the Act; and instead defers to a staff decision that is in conflict with the statute and evidences an abuse of discretion.

EAGLE asserts that DHEC erroneously issued its Demonstration of Need (“DON”) approval authorizing MMR Highway 92 to dispose of up to 154,000 tons of waste annually because: (1) the DHEC decision does not meet the Solid Waste Management Act’s requirement of a showing that a landfill is “needed;” and (2) DHEC arbitrarily failed to consider “additional factors” indicating that a new landfill is not needed to meet the public’s demands for waste disposal.

The ALJ corrected DHEC’s errors by giving meaning to the Act’s requirement for a demonstration of need for a new landfill by considering “additional factors” that bare upon the question of need – an interpretation and analysis that DHEC failed to undertake – thus providing a “compelling reason” to overturn DHEC’s interpretation and decision. *S.C. Coastal Conservation League v. DHEC*, 363 S.C. 67, 610 S.E.2d 482 (2005). In particular, what the ALJ did in this instance is take information from DHEC’s files and apply it to the statutory requirement for a “demonstration of need” and the Demonstration of Need regulations to arrive at his conclusion that the proposed landfill is not “needed.”

The result of the Court of Appeals’ Opinion overturning the ALC’s Order is to adopt an interpretation that is in direct conflict with the plain language of the Solid Waste Management Act and the controlling Regulations.

Overview of the Solid Waste Management Act and Its Regulations

Section 44-96-290(E) of the South Carolina Solid Waste Management Act states that “[n]o permit to construct a new solid waste management facility or to expand an existing solid waste management facility may be issued until a demonstration of need is approved by the department.” S.C. Code § 44-96-290(E).

DHEC has promulgated a regulation, R.61-107.17, entitled: “Solid Waste

Management: Demonstration-of-Need” (“DON Regulation”). S.C. Code Ann. Regs. § R.61-107.17. The original DHEC Regulation 61-107.17 became effective in 2000. On June 26, 2009, a new version of the DHEC Regulation became effective when it was published in the State Register. 33 S.C. State Register (No. 6, June 26, 2009).

The 2000 version of Regulation 61-107.17, which was utilized by DHEC in reviewing MRR’s proposed landfill, specifies a 10-mile “planning area” for construction, demolition, and land-clearing debris landfills.¹ Part D of Regulation 61-107.17 specifies the drawing of a circle with a 10-mile radius, the counting of “commercial” solid waste landfills within this planning area, and, if justified, the establishing of an annual disposal rate. The DON Regulation states that:

3. In determining if there is a need for a new or expansion of an existing solid waste disposal facility, the Department will use the criteria outlined below:
 - a. Where there are at least two (2) commercial disposal facilities under separate ownership within the planning area that meet the disposal needs for the area, e.g., that accept special waste and, if applicable, are capable of handling additional tonnage, no new disposal capacity will be allowed. Disposal facilities that accept only waste generated in the county or region in which the disposal facility is located will not be considered in determining need.
 - b. Each disposal facility in the planning area will be allowed up to a maximum yearly disposal rate equal to the total amount of solid waste destined for disposal that is generated in the county or counties that fall, either all inclusive or a portion thereof, within the planning area. Disposal rates for existing facilities shall not be reduced pursuant to this provision.

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The current version of Regulation 61-107.17 specifies the use of a 20-mile planning area for C & D landfills. S.C. Code Regs. § R.61-107.17(C)(3); 33 S.C. State Register (No. 6, June 26, 2009), pp. 119-135.

- c. In determining the amount of solid waste destined for disposal, the Department will use figures in the current Solid Waste Annual Report for the proposed waste stream, e.g., the generation rate for a Part IV construction, demolition debris and land-clearing debris landfill will be determined by adding the amounts of construction and demolition debris, and land-clearing debris destined for disposal in permitted construction, demolition, and land-clearing debris landfills in the counties that fall within the planning area.
- d. The Department reserves the right to review additional factors in determining need on a case-by-case basis.

To implement this Regulation, DHEC draws a circle around the location of the proposed landfill: a 10-mile radius circle under the old regulations, and a 20-mile radius circle under the current regulations. If two or more existing landfills are within the circle, the demonstration of need will not be approved. Any counties that fall within that 10-mile radius (under the 2000 regulations) are considered in the “planning area” for the purpose of determining permitted capacity of the new facility. Thus, DHEC adds together the total amount of waste that is generated in each of the counties falling within the 10-mile radius “planning area” and uses that amount to decide how much waste it will authorize the proposed new landfill to accept.

Section 61-107.17(D)(3)(d) of the 2000 regulation, and Section 61-107.17(D)(2)(b) of the current regulation, both instruct DHEC to “review additional factors in determining need on a case-by-case basis.” No definitions of the terms “demonstration,” “need,” or “additional factors” are provided in either the Act or the DHEC regulation.

Overview of the Facts and Evidence

At the contested case hearing, EAGLE presented the testimony of Scott Holland,

Kent Coleman and Jimmy Martin. Neither DHEC nor MRR Highway 92 called any witnesses.

Scott Holland has been the director of public works for Laurens County for nearly 20 years. (App. p. 109). He is in charge of the county's solid waste disposal program. Mr. Holland testified that the county operated a C & D² landfill for 12 years until May, 2009, and that landfill is now being closed out. (App. p. 110). The county continues to receive yard waste at the site, which is also used for recycling. (App. p. 111-112).

Mr. Holland testified that there are two other C & D landfills in Laurens County: a small landfill owned by the City of Clinton, and a privately-owned landfill known as the Curry Lake Landfill. (App. p. 112). The Curry Lake Landfill pays a "host fee" to Laurens County based on the number of tons of waste received and regularly reports to the county the amount of tonnage it receives. (App. p. 113). According to the County's records, the Curry Lake Landfill received 57,188.09 tons of waste in 2006, 65,577.03 tons in 2007, and 58,531.81 tons in 2008. (App. p. 431).

As to MRR's proposal to add a fourth C & D landfill in the County, Laurens County Council approved a resolution on June 27, 2006, stating that "Laurens County does not have an immediate need for the additional landfill space to be provided by the propose [sic] facility." (App. pp. 379-380).

Mr. Holland testified that he has never heard anyone in Laurens County say that they could not find a place to dispose of C & D waste. (App. p. 133). He said that

2

"C & D" landfills handle construction, demolition waste and land-clearing debris. Under current DHEC Regulations they are known as Class 2 landfills. S.C. Code Regs. §§ R.61-107.17, R.61-107.19, Part IV & Appendix 1.

Laurens County has never experienced any problems that could be attributed to a lack of C & D landfill capacity. (App. p. 133). He said that Laurens County has never discussed whether there is a need for more C & D landfill capacity, other than the June 27, 2006, resolution. (App. p. 134).

Mr. Holland testified that despite the closing of its landfill, the County uses the Curry Lake Landfill for disposal of its C & D waste. (App. p. 136). He said that there are competitive alternatives nearby, including Greenville County's Twin Chimneys landfill and a landfill operated by Republic Industries. (App. pp. 136-137).

Kent Coleman is in charge of DHEC's division of mining and solid waste management. Mr. Coleman identified documents from the DHEC administrative record. By letter dated February 21, 2006, Rudy M. Curtis, a consultant to MRR Southern Company, LLC, requested approval of a "Demonstration of Need" for a "private Part IV construction, demolition and land clearing debris landfill" in Laurens County, for the "maximum annual tonnage limit allowed." (App. p. 367). On March 3, 2006, Joan Litton of DHEC wrote a letter to Mr. Ronald C. Gilkerson of MRR Southern Company, LLC, stating that DHEC has received the letter from Rudy Curtis, evaluated the information, and "determined that pursuant to the provisions of R.61-107.17, *Demonstration of Need*, there is a need for this type of facility in the corresponding planning area. The Department may consider an annual disposal limit up to 154,000 tons during its consistency determination for this proposed facility." (App. p. 368 (Emphasis in original)).

In a letter dated June 12, 2006, DHEC was asked by Jeff Nicols, a Laurens County resident: "What data do we have that shows Laurens County has a need for a C & D

landfill?” DHEC’s response was: “‘Need’ as defined by DHEC is determined by the Demonstration of Need (DON) regulation and the county plan. Neither *prohibits* the proposed landfill.” (App. p. 369-372) (emphasis added).

On June 26, 2006, a letter signed by Rep. Michael A. Pitts, Rep. Jeffrey D. Duncan, Rep. J. Adam Taylor and Sen. Daniel B. Verdin III was submitted to DHEC, stating in part: “We express the following concerns and ask that you address them during the permitting process: First, the proximity to a current C & D landfill on Curry’s Lake Road in the Gray Court area of Laurens County. We question the need for a second landfill in this relatively short distance.” (App. pp. 377-378).

Mr. Coleman further testified that his office prepares an annual report on solid waste in South Carolina. Portions of the annual reports for fiscal years 2007 and 2008 were admitted as Petitioner’s Exhibits 24 and 25. (App. pp. 415-422, 423-430). On page 77 of the 2008 report there is a table showing the amount of C & D waste generated in each county “**for Use in Demonstrating Need.**” (App. p. 429). According to DHEC’s report, in fiscal year 2004 Laurens County generated 8,434 tons of C & D waste; the corresponding figure for 2005 was 6,635 tons; for 2006 it was 9,479 tons; for 2007 it was 16,860 tons; and for 2008 it was 12,811 tons. (App. pp. 162-163; App. 429 (Pet. Ex. 25, p. 77); see also, App. 421 (Pet. Ex. 24, p. 75)). On pages 74 and 75 of the 2008 report, and on pages 72 and 73 of the 2007 report, existing landfills are listed by county. (App. pp. 418-419, 426-427). For Laurens County, the reports list the City of Clinton landfill, with a permitted annual disposal rate of 1,375 tons, the Curry Lake Landfill, with a permitted annual disposal rate of 241,591 tons, and the Laurens County landfill, with a permitted annual disposal rate of 8,900 tons. ((App. pp. 418-419, 426-247). In fiscal year

2008, the Curry Lake Landfill received a total of 67,331 tons of C & D waste. (App. p. 427). In fiscal year 2007, the Curry Lake landfill received 67,260 tons of C & D waste. (App. p. 419).

Petitioner's Exhibits 24 and 25 include waste generation data for fiscal years 2003, 2004, 2005 and 2006. (App. pp. 420-421; App. pp. 428-429). The waste generation and landfill capacity³ figures for Fiscal Year 2004 are summarized in the following chart:

	Tons of C& D Waste Generated Annually	Existing Annual C & D Landfill Capacity	Percentage Utilization of Existing Capacity
Laurens County	8,434	251,866	3.3%
Greenville County	87,157	510,157	17.1%
Spartanburg	58,803	80,000	73.5%
Total - 3 counties	154,394	842,023	18.3%

The waste generation and landfill capacity figures for Fiscal Year 2005 are summarized in the following chart:

	Tons of C& D Waste Generated Annually	Existing Annual C & D Landfill Capacity	Percentage Utilization of Existing Capacity
Laurens County	6,635	251,866	2.6%
Greenville County	142,767	510,157	28.0%
Spartanburg	71,424	80,000	89.3%
Total - 3 counties	220,826	842,023	26.2%

The waste generation and landfill capacity figures for Fiscal Year 2006 are summarized in the following chart:

³ Includes the Laurens County C & D landfill, which was operating prior to May 2009.

	Tons of C & D Waste Generated Annually	Existing Annual C & D Landfill Capacity	Percentage Utilization of Existing Capacity
Laurens County	9,479	251,866	3.8%
Greenville County	163,450	510,157	32.0%
Spartanburg	68,662	80,000	85.8%
Total - 3 counties	241,591	842,023	28.7%

Mr. Coleman said that MRR's request for demonstration of need approval provided only the latitude and longitude of the proposed landfill, and no other information. (App. pp. 166-167). In deciding to issue an approval letter, DHEC first plotted the latitude and longitude on a map, and then drew a circle with a 10-mile radius around that plotted point. (App. p. 172). DHEC then counted the number of commercial C & D landfills within the circle and found only one such landfill, the Curry Lake Landfill. (App. p. 172). Since the number of existing commercial C & D landfills within the circle was less than two, DHEC determined that it would approve the demonstration of need. (App. pp. 173-174). To calculate the maximum allowable yearly disposal rate, DHEC added together the total amount of waste generated in all of the counties touched by the circle (Greenville, Spartanburg and Laurens). (App. pp. 173-174). Using this method, the Department set the annual disposal rate at 154,000 tons per year. (App. pp. 174-175).

Mr. Coleman explained that in setting the annual disposal rate, all of the C & D waste generated by Spartanburg, Greenville and Laurens Counties was added together. (App. P. 177). Moreover, Mr. Coleman explained that all of the waste generated throughout the entirety of these counties was included in setting the annual capacity limit

for the proposed MRR landfill, with no reduction fo existing C & D disposal capacity, and even though the 10-mile planning circle included only a portion of these counties. (App. pp. 177-178).

When DHEC issued the letter approving MRR's demonstration of need in 2006, DHEC had only plotted the location of the landfill on a map, counted the number of existing commercial landfills within the 10-mile radius circle, and counted the total amount of waste generated within each county touched by the circle. (App. pp. 180-181). Mr. Coleman said that DHEC views the 10-mile radius circle as a "planning area, which is a regional concept." (App. p. 182). He said that there is not an actual "regional plan" for dealing with C & D waste in Laurens, Greenville and Spartanburg Counties. (App. pp. 182-183).

The DHEC solid waste reports show that Spartanburg County has a landfill known as the Wasp Road landfill, which has a permitted capacity of 80,000 tons per year. (App. p. 184; App. pp. 419, 427). The reports also show that in fiscal year 2008, the amount of C & D waste generated in Spartanburg County was 26,364 tons, (App. p. 184; App. P. 429), and in 2007, Spartanburg County generated about 72,000 tons of C & D waste. (App. p. 186; App. p. 4421).

The 2008 DHEC solid waste report shows that in 2008, Greenville County generated 210,924 tons of C & D waste. (App. pp. 184-185; App. p. 429). Greenville County has four C & D landfills: Carter Excavation Company, Big Valley, with an annual capacity of 75,000 tons; Greenville Republic, with an annual capacity of 200,000 tons; Twin Chimneys, with an annual capacity of 87,000 tons, and W.C.A. Shiloh, with an annual capacity of 128,000 tons. (App. p. 426). In total, the three counties touched by the

10-mile circle generate a combined total of a little over 300,000 tons of C & D waste per year, and they have a combined annual landfill capacity of more than 810,000 tons. (App p. 186-187; App. 415-429).

Mr. Coleman acknowledged that the annual landfill capacity is more than the actual disposal rate for the Greenville landfills. (App. p. 188). The Greenville Republic landfill, with a permitted capacity of 200,000 tons, actually received 48,057 tons in fiscal year 2008. (App. 187-188 (Tr. 105-106); App. P. 426 (Pet. Ex. 25)). The Twin Chimneys landfill, with a permitted capacity of more than 87,000 tons, took in 51,000 tons in 2008. (App. p. 426). And W.C.A. Shiloh, with a permitted capacity of 128,000 tons, took in a little more than 80,000 tons in 2008. (App. pp. 188; App. p. 426).

Mr. Coleman acknowledged that the Curry Lake Landfill's permitted capacity of 240,000 tons was not taken into account in making the demonstration of need determination for the MRR landfill. (App. 188-189). He acknowledged that the Curry Lake Landfill has a licensed annual capacity that would handle 241,000 tons of the 300,000 tons generated within the three counties. (App. 251-252). He explained that DHEC takes into account the number of existing C & D landfills within the 10-mile radius "planning area," but that DHEC did not take into account the existing landfill capacity in Spartanburg and Greenville counties, nor the fact that these counties have landfill capacities that exceed the rate of waste generation. (App. 189). Again, there are additional commercial C & D landfills within Spartanburg and Greenville Counties that can take in 570,000 tons of waste per year. (App. pp. 252-253).

On July 18, 2008, DHEC issued the staff decision to issue the permit to MRR. (App. pp. 193-194; App. 400-414). DHEC gave public notice of this decision and issued

a “staff decision summary report.” (App. 194; App. 407-413). In responding to questions about the need for the landfill, the Department’s summary report said:

The Department addresses the need for landfills in South Carolina under Regulation 61-107.17, *Demonstration of Need* (DON). The DON regulation allows for up to two (2) long-term, commercial C&D landfills within a ten (10) mile radius of any given location within South Carolina. At the time of the February 21, 2006 DON request, there was only one long-term, commercial C&D landfill located within the ten-mile radius of the proposed site, (Curry Lake C&D Landfill). Therefore, per Regulation 61-107.17, the permit applicant was able to demonstrate need for a new C&D landfill at the proposed landfill site.

(App. 412).

In addition to the presentation of Mr. Coleman’s testimony, the Petitioner placed into evidence the deposition testimony given by Mr. Coleman as DHEC’s designated spokesman under SCRCF 30(b)(6). (App. 289-366). In that deposition, Mr. Coleman was asked about Regulation 61-107.17(D)(3)(d), which authorizes DHEC to consider “additional factors” in reviewing an application for “demonstration of need” approval:

Q. Okay. Now, was this section utilized at all in the permitting of this MRR landfill?

A. No.

(App. pp. 344-346, see also App. p. 344, line 19 through 21, App. p. 345, lines 12 through 20). Mr. Coleman was then asked about the public comments received during the permit review:

Q. Okay. And despite these comments, what you’re saying is that the Department stuck to the parts -- I mean, Section D and items One, Two and Three, A and B and C, but you did not utilize the right to review additional factors that’s provided in subsection D of that part?

A. We did not review additional factors -- Well, I should say that we didn’t use any additional factors to make our decision in this case.

(App. 346-348; lines 18 through 25 to p. 348, line 2 ; see also App. 346, line 19 through p. 347, line 17).

Mr. Coleman said that DHEC regulations do not define “additional factors” or when they will be considered in determining need, nor do DHEC regulations specifically define the term “need” within the overall “demonstration of need” regulation or otherwise. (App. 202-203). He said that DHEC has never used the “additional factors” provision in making a decision on a landfill permit. (App. p. 204, lines 14-18). Furthermore, Mr. Coleman testified that the Department not only did not consider the fact that Laurens County already has a landfill with an annual capacity more than ten times the amount of waste generated annually in the county (App. pp. 204-205; R. pp. 203-204), but also that he felt considering this factor would be “arbitrary.” (App. pp. 205-206; R. pp. 204-205).

Mr. Coleman went on to explain that the Department did not consider the excess capacity in Greenville County, nor the fact that the formula used the amount of waste generated in all of Greenville County when the 10-mile circle took in only a small portion of the county. (App. 208-209). He said that DHEC did not consider the fact that several existing commercial landfills lie just outside the 10-mile planning circle. (App. 209-210). He said that he could not think of any type of “additional factor” that could cause DHEC to change the DON decision made using the formula of Regulation 61-107.17. (App. p. 246). In fact, he said that he could not think of anything that he would ever consider an “additional factor.” (App. pp. 209-210).

Under a proffer by the Petitioner, Mr. Coleman said that a new version of Regulation 61-107.17 that came into effect on June 26, 2009, the 10-mile planning circle

has been expanded to a 20-mile planning circle. (App. pp. 214-216). Under the new regulation, there are four or five existing landfills within the planning area, and if DHEC were making the decision on the demonstration of need today, the decision under the regulation would be to deny. (App. pp. 216-217 (Proffered)).

On cross-examination by MRR, Mr. Coleman noted that the last page of Petitioner's Exhibit 26 shows that for fiscal year 2005, the Curry Lake Landfill received 3,098.24 tons of C & D waste from Laurens County, and also received a total of 51,511.38 tons from other counties. (App. pp. 219-220 & 437).

Mr. Coleman said that DHEC had the county waste generation and landfill capacity information in the 2007 solid waste report at the time it made its decision to issue the MRR permit. (App. p. 225). He said that between February 21, 2006, when MRR sent its request for demonstration of need approval, and March 3, 2006, when DHEC issued its approval letter, no one asked DHEC to consider additional factors. (App. 228-229). He said that the comments made by the public were not sufficient to change the Department's position on the needs approval. (App. pp. 231-232).

Only landfills within the 10-mile circle are counted under the formula of Regulation 61-107.17 to determine whether a landfill is "needed," but waste generated outside the circle is counted in determining the allowable new permitted capacity. (App. pp. 253-256).

Mr. Coleman said that DHEC feels that the distance to a landfill should be "reasonable," and that there should be a certain amount of competition among landfills. (App. p. 259). He said that the Curry Lake Landfill is about 4 miles from the site of the proposed MRR landfill. (App. p. 260). He could not address how this new landfill would

promote competition or efficiency; he could only say that these factors were “discussed” while the regulation was being promulgated. (App. pp. 261-262).

James Travis Martin is a member of EAGLE, lives in the Gray Court area of Laurens County, and has been a contractor for 35 years. (App. pp. 264-267). His company does highway and “heavy civil work.” (App. p. 267). From 1979 to 1984, his company ran the Laurens County landfill as a contractor for the County. (App. p. 267). In his work, he regularly disposes of C & D waste. (App. pp. 267-268). Most of his waste is hauled to the Curry Lake Landfill, but he also sends waste to the Republic landfill, a landfill in Oconee County, and the Twin Chimneys landfill. (App. p. 268). He said that the Curry Lake Landfill is a little over three miles from the MRR site. (App. p. 268). He said that he has never had any problems finding a site to dispose of his waste, and he knows of no problems experienced by other contractors in the area. (App. pp. 268-269). He said that he sees no need for another landfill, because Laurens County already has the Curry Lake Landfill and there are several other landfills in the area. (App. p. 269).

Neither DHEC nor MRR presented any witnesses.

I. The Court of Appeals Erred in Giving Deference to the Department’s Interpretation of Regulation 61-107.17 and Section 44-96-290(E) Because DHEC’s Interpretation is in Direct Conflict with the Plain Language of Section 44-96-290(E)

The Court of Appeals, without any analysis or elaboration, cites *S.C. Coastal Conservation League v. S.C. Dep’t of Health & Env’tl. Control* for the proposition that “[c]ourts defer to the relevant administrative agency’s decisions with respect to its own regulations unless there is a compelling reason to differ.” 363 S.C. 67, 75, 610 S.E.3d 482, 486 (2005). The Court of Appeals’ summary conclusion overlooks the limitations on

the agency's discretion and authority explained in that case: Where an agency's interpretation of the regulation leads to a **direct conflict** with the plain language of the statutory mandate, it is an error to show the utmost deference to that interpretation by requiring a "compelling reason to differ." *Id.*

An agency's long-standing interpretation of a statute is usually entitled to deference and should not be overruled by a reviewing court in the absence of cogent reasons, but **the interpretation will not be sustained if it contradicts a statute's plain language.** *Etiwan Fertilizer Co.*, 217 S.C. at 359, 60 S.E.2d at 684. See *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) ("We recognize the Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation. Nevertheless, where, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation." (citation omitted)).

"All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *Ray Bell Constr. Co. v. Sch. Dist. of Greenville County*, 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998) (emphasis in original).

The legislature's intent should be ascertained primarily from the plain language of the statute. *State v. Landis*, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App.2004); *Morgan*, 352 S.C. at 366, 574 S.E.2d at 206; *Stephen v. Avins Constr. Co.*, 324 S.C. 334, 339, 478 S.E.2d 74, 77 (Ct. App.1996). If a statute's language is unambiguous and clear, there is no need to employ the rules of statutory construction and the Court has no right to

look for or impose another meaning. *Tilley v. Pacesetter Corp.*, 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003); *Paschal v. State Election Comm'n*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995). Statutory language must be read in a sense which harmonizes with its subject matter and accords with its general purpose. *Mun. Ass'n of S.C. v. AT&T Commc'ns of S. States, Inc.*, 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004); *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

In passing the Solid Waste Management Act in 1991, the legislature recognized that “[m]ost of the permitted landfill capacity will be used within the next ten years. Twenty-three of forty-six counties have ten years or less of landfill space remaining.” S.C. Code Ann. § 44-96-20(6). But the legislature also recognized that capacity might not be a problem in the future, and therefore required that any new landfills must demonstrate that the proposed landfill is *actually* needed. S.C. Code Ann. § 44-96-290(E). The Act plainly states that: “No permit to construct a new solid waste management facility or to expand an existing solid waste management facility may be issued until a demonstration of need is approved by the department.” S.C. Code § 44-96-290(E).

In applying this language, the Department did not consider the existing capacity of the tri-county planning area and compare that to the current disposal rates; did not consider the fact that Laurens County already has a landfill with an annual capacity more than ten times the amount of waste generated annually in the county (App. pp. 204-05); did not consider the excess capacity in Greenville County, nor the fact that the formula used the amount of waste generated in all of Greenville County when the 10-mile circle took in only a small portion of the county (App. pp. 208-209); and did not consider the

fact that several existing commercial landfills lie just outside the 10-mile planning circle, (App. pp. 209-10). All of this information is relevant and readily available to the Department. Yet none of it was utilized in making a determination of whether the proposed landfill is “needed.”

In *Media Gen. Comm. v. S.C. Dept. Revenue*, this Court concluded that the ALC was not required to defer to the Department's interpretation because it was contrary to the plain language of the statute. *Media Gen. Commc'ns, Inc. v. S. Carolina Dep't of Revenue*, 388 S.C. 138, 149-50, 694 S.E.2d 525, 530-31 (2010); See *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) (“We recognize the Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation. Nevertheless, where, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation.”)

In *Media General*, Section 12-6-2030(A)(4) authorized the “employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer’s income.” The Department of Revenue asserted it was not authorized to apply the combined entity apportionment method, that it had never applied that method, and that its interpretation and application were entitled to deference. The ALC concluded that the statute was “clear on its face and that the legislative intent expressed therein was to allow the use of ‘any other method’ to apportion income where the standard statutory formulas resulted in an unfair apportionment of a taxpayer's business income in South Carolina.” *Id.* at 138, 530.

The case now before the Court bears a striking similarity to *Media General*.

In making its determination of need, the Department looked solely at the number of “commercial” landfills within a 10-mile radius of the site of the proposed MRR landfill. Despite the clear authority of Section 61-107.17(D)(3)(d), DHEC did not consider any other factors that bear on the question of need.

DHEC Staff has interpreted and applied R.61-107.17 in a manner that does not fulfill the statutory requirement for a “demonstration of need.” Under the holdings of this Court, the staff’s interpretation must fall. *See Milliken and Co. v. S.C. Dep’t of Labor*, 275 S.C. 264, 267-68 (“It is well settled that an administrative order which materially alters or adds to the law is void. The same principle applies to administrative rule-making.” (citations omitted); *Society Of Professional Journalists v. Sexton*, 283 S.C. 563, 567 (“Although a regulation has the force of law, it must fall when it alters or adds to a statute.”).

In this case, the “interpretation” that the Respondent suggests is entitled to deference is the DON Regulations themselves, which the Respondent asserts are DHEC’s “interpretation” of the Act’s requirement that “need” be “demonstrated.” (Resp. Response pp. 10-11). If it is the regulations themselves that are entitled to deference, then the Court should look to whether those Regulations carry out the express intent of the General Assembly or whether they materially alter or add to the statute. In this case, if the Regulations are utilized in a manner such that DHEC **never** considers additional factors and provides no reason for doing so, and lead to the result suggested by MRR that “the application of the express criteria set forth in the DON Regulations may lead to a permitted annual capacity **in excess of the amount of waste generated in the host county and the other counties within a facility’s planning area,**” (App. pp. 953-54),

then the regulations do not truly measure whether a landfill is needed, as required by the Act. Rather, if the Regulations are interpreted in the manner Respondent suggests, they add to the Act by allowing for landfills that fail to demonstrate that they are needed to meet existing or future disposal needs.

In *Young v. SC Dep't of Highways and Public Transp.*, 287 S.C. 108, 336 S.E.2d 879 (Ct. App. 1985), the Court of Appeals recognized that an agency's authority to promulgate regulations, and deference to the agency's interpretation of the statute, are limited to circumstances where the agency regulation and interpretation are "reasonably related to the purpose of the enabling legislation." 287 S.C. at 112, 336 S.E.2d at 882. Here, the enabling legislation is Section 44-96-290(E) of the Solid Waste Policy & Management Act, which requires a "demonstration of need." S.C. Code § 44-96-290(E). If MRR is correct and DHEC has promulgated a regulation that turns the mandate of "need" into a mandate for "excess capacity," then the regulation is in direct conflict with the statute and must fall. *Milliken and Company v. South Carolina Department of Labor*, 275 S.C. 264, 269 S.E.2d 763 (1980); *Society of Professional Journalists v. Sexton*, 283 S.C. 563, 324 S.E.2d 313 (1984).

Despite MRR's assertion that the DON Regulations are the agency's "interpretation" of the Act's requirement for a "demonstration of need," on the face of the DON regulations themselves it is clear that the agency did not define the term "need." The DON regulations state that "**In determining if there is a need** for a new expansion of an existing solid waste disposal facility, **the Department will use the criteria outlined below:** . . ." S.C. Code Ann. Regs. § 61-107.17(D). The DON regulations thus set forth the **criteria** that DHEC is to use in reviewing an application and determining

whether it is needed, but the regulation does not provide a definition of “need.”

Similarly, the Act does not define “need.”

The ALC is the only entity that actually made an interpretation using the well-established principles of statutory interpretation, as directed in *New York Times Co. v. Spartanburg County School Dist. No. 7*, 374 S.C. 307, 649 S.E.2d 28 (2007). The Court of Appeals pointed to no error of law in the ALC’s interpretation of Section 290(E)’s requirement that a demonstration of “‘need’ must involve some proof that the circumstances within the region of the landfill indicate additional landfill capacity is needed to meet the public’s demands.”⁴ (App. pp. 956-57)

II. DHEC Failed to Exercise Any Discretion and This Failure Amounts to an Abuse of Discretion

4

“Need” has been defined to mean: “1. A condition or situation in which something is needed or wanted: *crops in need of water; a need for affection*. 2. Something required or wanted; a requisite: “*Those of us who led the charge for these women’s issues . . . shared a common vision in the needs of women*” (Olympia Snowe). 3. Necessity; obligation: *There is no need for you to go*. 4. A condition of poverty or misfortune: *The family is in dire need*.” The American Heritage Dictionary of the English Language (4th Ed. 2000), p. 1175. “Need” has been defined in Black’s Law Dictionary as follows: “A relative term, the conception of which must, within reasonable limits, vary with the personal situation of the individual employing it. Term means to have an urgent or essential use for (something lacking); to want, require.” Black’s Law Dictionary, Abridged Sixth Edition, 1991, p. 715.

Applying these plain English and legal definitions to the terms used by the General Assembly, it is obvious that to fulfil the statutory requirement, a “demonstration of need” must involve proof of an actual need or requirement for additional landfill capacity, as the ALC correctly concluded.

In lieu of a true “demonstration of need,” DHEC applied only the formula portions of Regulation 61-107.17 to arrive at a decision that this landfill is needed and that its annual capacity should be 154,000 tons per year – for a county that already has landfills with a permitted capacity of 251,866 tons per year while generating only 17,000 tons per year.

A failure to exercise discretion amounts to an abuse of that discretion. *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997); *Fontaine v. Peitz*, 291 S.C. 536, 538; 354 S.E.2d 565, 566 (1987) (“When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred.”); *Balloon Plantation v. Head Balloons*, 303 S.C. 152, 155, 399 S.E.2d 439, 441 (Ct. App.1990). It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly. *State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981).

While the courts may not substitute judicial discretion for administrative discretion, and therefore as a general rule will not attempt to interfere with the exercise of discretionary power by a governmental agency, capricious or arbitrary exercise of administrative discretion is of course subject to judicial review. *Cole v. Manning*, 240 S.C. 260, 267-68, 125 S.E.2d 621, 625 (1962); *South Carolina Electric & Gas Co. v. South Carolina Public Service Authority*, 215 S.C. 193, 54 S.E.2d 777; *Griggs v. Hodge*, 229 S.C. 245, 92 S.E.2d 654; *Board of Bank Control v. Thomason*, 236 S.C. 158, 113 S.E.2d 544.

A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards. *Deese v. S.C. State Bd. of Dentistry*, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985).

The Demonstration of Need Regulations have four (4) criteria which DHEC must use in making a determination of need. S.C. Code Ann. Regs. § 61-107.D.(3). The first

criteria of the DON Regulation states that “Where there are at least two (2) commercial disposal facilities under separate ownership within the planning area that meet the disposal needs for the area . . . no new disposal capacity will be allowed.” S.C. Code Ann. Reg. § 61-107.17(D)(3)(a). DHEC’s Kent Coleman testified that MRR’s request for demonstration of need approval provided only the latitude and longitude of the proposed landfill, and no other information. (App. pp. 166-169). In deciding to issue an approval letter, DHEC first plotted the latitude and longitude on a map, and then drew a circle with a 10-mile radius (the “planning area”) around that plotted point. (App. p. 172). Then DHEC counted the number of commercial C & D landfills within the circle and found only one such landfill, the Curry Lake Landfill. (App. p. 172). Since the number of existing commercial C & D landfills within the circle was less than two, DHEC determined that it would approve the demonstration of need. (App. p. 173).

The second and third criteria, 61-107.17(D)(3)(b) & (c), go beyond the real issue of need, and jump to the issue what capacity limits should be placed on a “needed” landfill. Accordingly, subparts (b) and (c) come into play only after “need” is determined through the other criteria.

The fourth criteria of the DON Regulation is “the right to review additional factors in determining need on a case-by-case basis.” S.C. Code Ann. Regs. § 61-107.17(D)(3)(d). The inclusion of Regulation 61-107.17(D)(3)(d) shows that DHEC recognized that there would be situations when the rote application of the formulas would not properly determine whether a proposed landfill is needed. This subpart at least provides a mechanism for consideration of additional factors that may bear on the question of need – factors like the amount of existing landfill capacity compared to the

amount of waste going to landfills. DHEC applied the first three criteria of Regulation 61-107.17(D)(3), but failed to apply the fourth criteria, consideration of additional factors, and **failed to provide any basis for its decision to exclude information indicating that there was no need for the proposed facility.**

The Court of Appeals summarily concluded that the ALC should be reversed because “the agency acted within its discretion by declining to consider additional factors in issuing a demonstration of need to MRR.” (App. p. 993). Again, it is difficult to uncover the supporting basis for this statement because the Court of Appeals’ Opinion contains no analysis. However, it is apparent from this statement that the Court of Appeals failed to recognize what is clear from the record: DHEC staff did not merely decline to consider “additional factors,” but rather failed to identify evidence that qualified as additional factors or even to acknowledge that additional factors could exist under any circumstance.

DHEC’s Kent Coleman testified that 61-107.17(D)(3)(d) authorizing the consideration of “additional factors” was not utilized by DHEC in making its DON determination. (App. pp. 345-346). Mr. Coleman said that DHEC has nothing defining “additional factors” or when they will be considered in determining need, nor does DHEC have a definition of “need” other than the overall “demonstration of need” regulation. (App. pp. 202-203). He said that **DHEC has never used the “additional factors” provision in making a decision on a landfill permit.** (App. p. 204, lines 14-18). He also said that **he could not think of anything that the Department would ever consider an “additional factor,”** even if it decided to so. (App. pp. 209-210).

The Court of Appeals' Opinion states that DHEC merely declined to consider additional factors. This statement is a vast oversimplification. According to DHEC, the agency would not recognize an "additional factor" if it landed in its headquarters on Bull Street. Despite its inability to identify any information that it would consider an "additional factor," all of the data relevant to the inquiry of whether there is actually a need for a new landfill is found within DHEC's own files: the amount of C & D waste generated in Laurens County and regionally; existing capacity of C & D landfills; and how much C & D waste is actually disposed of at each of these landfills. Mr. Coleman testified that his office prepares an annual report on solid waste in South Carolina. Portions of the annual reports for fiscal years 2007 and 2008 were admitted as Petitioner's Exhibits 24 and 25. (App. pp. 415-430). All of this information DHEC gathers and puts together in an annual solid waste report, yet uses none of it in determining whether a proposed landfill is "needed," much less recognizing them as factors bearing on the question of need.

In this case the rote formula set forth in the first three subparts of Regulation 61-107.17(D)(3) was the beginning, middle and end of DHEC's inquiry. The fourth subpart giving DHEC the ability to consider "additional factors" was not, and has never been, applied. The Department's complete failure to consider "additional factors" is not an exercise of discretion entitled to deference. It is not within an agency's discretion to ignore relevant evidence and factors. On the contrary, "it is arbitrary or capricious for an administrative agency not to take into account all relevant factors in making its determination." *Hanly v. Mitchell*, 460 F.2d 640, 648 (2nd. Cir. 1972) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971)).

The failure to consider other factors in determining whether the applicant really made a proper demonstration of need is plainly an arbitrary and capricious action. “[I]t is arbitrary or capricious for an administrative agency not to take into account all relevant factors in making its determination.” *Hanly v. Mitchell*, 460 F.2d 640, 648 (C.A.2 1972) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971)).

The Court of Appeals erred in overlooking the fact that **DHEC has never considered any additional factors, that it could not even think of what an additional factor worth considering might be, and that DHEC simply applies the first three criteria of the DON regulation without ever applying the forth criteria.**

DHEC’s decision was an arbitrary and capricious abuse of discretion in that it failed to exercise any discretion. This is not a case of the agency exercising discretion one way or the other, but rather of entirely failing to exercise any discretion. It was therefore error for the Court to award such considerable deference to the staff’s decision.

III. The Court of Appeals Erred in Rejecting the ALC’s Finding and Conclusion that there is No Need for the Proposed Landfill When There is Existing Excess Permitted Landfill Capacity and Where the Plain Language of the Act Requires the Applicant to Make a “Demonstration of Need.”

Where an agency’s interpretation of the regulation leads to a situation that is in direct conflict with the plain language of the statutory mandate, it is an error to show the utmost deference to that interpretation by requiring a “compelling reason to differ.” *S.C. Coastal Conservation League v. S. Carolina Dept. of Health & Env’tl. Control*, 363 S.C. 67, 610 S.E.2d 482 (2005). The appellate court must presume the legislature intended to

accomplish something with an enacted statute and did not intend for a section or provision to be purposeless or futile. *Duvall v. S.C. Budget and Control Bd.*, 377 S.C. 36, 42, 659 S.E.2d 125, 128 (2008). Courts will reject statutory interpretations that lead to absurd results clearly unintended by the legislature or that defeat the plain legislative intent. *Peake v. State*, 375 S.C. at 599, 654 S.E.2d at 289; *Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)).

The issue of interpretation of a statute is a question of law for the court. *State v. Sweat*, 379 S.C. 367, 373, 665 S.E.2d 645, 648 (Ct. App. 2008) *aff'd as modified*, 386 S.C. 339, 688 S.E.2d 569 (2010).

The Court of Appeals erred in rejecting the ALJ's plain language application of Section 44-96-290(E) and interpretation of Regulation 61-107.17 in a manner that effectuates that plain language and legislative intent.

The plain language of the Solid Waste Management Act requires a landfill applicant to make a "demonstration of need." If the General Assembly declines to define a term within the statute, the Court should construe the word in accordance with its usual and customary meaning. *Adoptive Parents v. Biological Parents*, 315 S.C. 535, 543, 446 S.E.2d 404, 409 (1994). Recognizing the fact that "need" is not defined in the statute or regulations, the ALC interpreted the Solid Waste Management Act § 44-96-290(E)'s requirement for a "demonstration of need" by looking to the plain and ordinary meaning of the terms. *New York Times Co. v. Spartanburg County School Dist. No. 7*, 374 S.C. 307, 649 S.E.2d 28 (2007). The ALJ looked to the definition of "need," which has been defined to mean "a condition requiring supply or relief." (App. p. 970, citing *Merriam-Webster's Online Dictionary*).

The ALJ then took DHEC's own data – none of which was contested – and applied those factors to the statutory requirement for a demonstration of need and actually determines whether the proposed landfill is “needed,” i.e., whether there is “proof that the circumstances within the region of the landfill indicate additional landfill capacity is needed to meet the public’s demands.” (App. 970-971, ALC Order p. 6-7). The ALC found that in the tri-county planning area that the proposed landfill falls within, there is less than 30% utilization of existing capacity – that the planning area has 70% more capacity than what it generated and utilized in the area. (App. pp. 972-73). The ALJ found that for Fiscal Year 2007, the three counties generated 250,759 tons of C & D waste, and had 842,023 tons of existing C & D capacity. (App. p. 967). The percentage utilization of existing capacity was found to be 29.8%. *Id.* Applying the definition of need to this factual finding, the ALJ rightfully concluded that the agency’s interpretation of the DON Regulation conflicted with Section 290(E)'s requirement for an actual “demonstration of need,” and he was therefore required to reject the interpretation as contrary to the statute. Specifically, the ALJ concluded that “the 32.9% utilization of existing capacity simply does not reflect a need for another landfill in the area. In other words, the three county area is generating less than 300,000 tons of C & D waste per year, and even excluding the Wasp Nest landfill it has over 750,000 tons of existing annual C & D landfill capacity. Furthermore, once the annual tonnage of the proposed landfill is factored into the existing C & D landfill capacity . . . the use of existing capacity would only be 27.38%. Looking further into the future, after the remaining life of the Republic landfill is finished, the use of existing capacity would still only be 35.02%. I therefore find the proposed facility is not needed.” (App. p. 973, ALC Opinion, p. 9).

The Court of Appeals overlooked the ALC's consideration of the "plain and ordinary" meaning of the word "need" in determining whether the required "need" had been demonstrated. More specifically, the Court overlooked the ALC's conclusion that "it is obvious that the General Assembly intended that a demonstration of 'need' must involve some proof that the circumstances within the region of the landfill indicate additional landfill capacity is needed to meet the public's demands." (App. pp. 970-971, ALC Order, p. 6-7). In the instant case, DHEC failed to apply the plain language of the Solid Waste Management Act's requirement for a "demonstration of need" in making its permit decision. The ALC recognized this clear conflict between the Act's requirement for a "demonstration of need" and DHEC's rote application of a formula, and gave meaning to the term "need." In so doing, the ALC interpreted the Solid Waste Management Act to require some proof that a landfill is actually needed, that a demonstration of need "must involve some proof that the circumstances within the region of the landfill indicate additional landfill capacity is needed to meet the public's demands." (App. pp. 970-971, ALC Order, p. 6-7).

The Court of Appeals erred in showing deference to the Staff's contrary interpretation and rejecting the ALC's interpretation based on the plain language of Section 290(E).

CONCLUSION

The Appellants present alternate theories that can essentially be explained as follows: either DHEC erred in its interpretation of the statute or DHEC erred in its application of the statute. One or the other has to be true, because the end result is that DHEC has permitted, and would continue to permit under its framework, landfills that are

not needed. Either DHEC's regulations are inherently flawed and do not implement the General Assembly's intent that need be demonstrated, or the regulations (through subpart d) do reflect the intent but are not being applied in a manner that carries out that intent.

For the foregoing reasons, Respondent Engaging and Guarding Laurens' Environment respectfully requests that this Court reverse the Court of Appeal's Opinion and reinstate the ALC's Opinion which found and concluded that the applicant failed to demonstrate a need for the proposed landfill.



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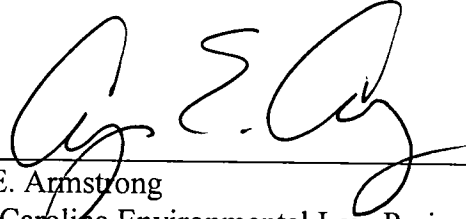
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The undersigned does hereby certify that this Brief complies with SCRAP Rule 211(b).



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June 7, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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JUN 10 2013

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

S.C. Supreme Court

ON WRIT OF CERTIORARI

Case No. 08-ALC-07-0425-CC

Engaging and Guarding Laurens County's Environment ("EAGLE") Petitioner,

vs.

South Carolina Department of Health and Environmental Control
and MRR Highway 92, LLC, Respondents,

of whom MRR Highway 92, LLC, is Appellant.

CERTIFICATE OF SERVICE

I hereby certify that on this date I served copies of the Brief of Petitioner Engaging and Guarding Laurens Environment upon counsel for the Respondents by placing same in the United States Mail, First Class Postage Prepaid, addressed to:

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