

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III
Administrative Law Judge

Case No. 2017-002598

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SC Court of Appeals

CHARLES S. BLACKMON AND SOUTH CAROLINIANS FOR RESPONSIBLE
AGRICULTURAL PRACTICES, ... APPELLANTS,

v.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL,
AND DAVID COGGINS BROILERS, ... RESPONDENTS,

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FINAL REPLY OF APPELLANTS TO RESPONDENTS' INITIAL BRIEFS

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ARGUMENTS

1. Appellants' Issues on Appeal Are Preserved for Appellate Review.

Permittees' argument that Appellant failed to preserve certain issues for appellate review lacks merit. "At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge." *Malloy v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014). "The issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge." *Id.* A Rule 59(e) motion is not necessary to preserve issues that have been ruled upon. *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011). Here, the issues on appeal were sufficiently raised and ruled upon.

There is no question that Appellants raised the issue that Permittees must obtain a CAFO NPDES permit or otherwise seek a determination that their proposed facilities have "no potential to discharge." In their Prehearing Statements, Appellants clearly raised the argument that Permittees are large concentrated animal feeding operations ("CAFO") and as such, must obtain a NPDES permit applicable to their operations or otherwise demonstrate "no potential to discharge." (Appendix R. p. 1726 – 1758). Permittees filed a motion for summary judgment on this issue, arguing that, as a matter of law, they have no obligation to obtain a CAFO NPDES permit because the "no-discharge" animal agricultural permits issued by DHEC removes their operations from the ambit of S.C. Code Ann. Regs. 61-9.122.23, and DHEC was not required to determine whether the facilities have "no potential to discharge." (R. p. 223-225). Appellants again raised the CAFO issue in their opposition to Permittees' summary judgment motion. (R. p. 246 – 293). And in their proposed order submitted to the ALC, Appellants raised the CAFO issue. (R. p. 168 –

172). Finally, Appellants stated the issue as an issue on appeal in their Initial Brief and presented arguments concerning same.

Permittees mistakenly assert that Appellants failed to raise to the ALC particular points made in Appellants' Brief concerning their CAFO NPDES issue, identified in Permittees' Brief as "perceived errors" enumerated as 1-5. Permittees' Brief, pp. 14-15. Permittees' second perceived error concerns Appellants' argument that DHEC's interpretation of the regulations are merely a post hoc rationalization. Appellants agree that this argument was not raised and ruled upon by the ALC; however, the intent of this argument was to anticipate and address what Appellants believed could be an additional sustaining ground of Respondents. There is no error in anticipating Respondents' additional sustaining grounds. To the extent that addressing additional sustaining grounds is limited to Appellants' Reply Brief, Appellants' "post hoc rationalization" argument is repeated in this Reply.

As for the remaining alleged errors 1, 3, 4, and 5, the degree of specificity seemingly advanced by Permittees is simply not required by this Court. An issue is preserved for review if it is "sufficiently clear" to the ALC such that is "reasonably understood by the judge." *Malloy v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014). Appellants argued below that the plain and unambiguous language of S.C. Code Ann. Regs. 61-43 Part 200 and S.C. Code Ann. Regs. 61-9.122.23 yields the result that DHEC should have required Permittees to obtain an NPDES CAFO permit in conjunction with their animal agricultural permit. See (R. p. 249 – 251; R. p. 372 – 390). The ALC's opinion shows that Judge Anderson reasonably understood Appellants' arguments and addressed them. (R. p. 7 – 11). Issue preservation rules are approached "with a practical eye

and not in a rigid, hyper-technical manner.” *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011).

Not only did Appellants sufficiently raise the CAFO NPDES issue, the ALC ruled on it. Upon reviewing the arguments made by both parties, Judge Anderson ruled in favor of Respondents. Because the ALC rejected Appellants’ arguments, the issue was ruled upon by Judge Anderson. *See Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011) (finding issue preserved when judge reviewed competing arguments and rejected appellant’s arguments); *Hardaway Concrete Co. v. Hall Contr. Corp.*, 374 S.C. 216, 225-26, 647 S.E.2d 488, 493 (Ct. App. 2007) (same). Thus, it was unnecessary for Appellants to make any post-hearing motions. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76-77, 497 S.E.2d 731, 734 (1998). Permittees concede this point in their Brief when they state that the ALC rejected Appellants’ contentions. Permittees’ Brief, p. 19.

To the extent this Court has any doubt whether the NPDES CAFO issue was sufficiently preserved for review, “where the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.” *Johnson v. Roberts*, 812 S.C. 406, 411, 529 S.E.2d 207, 210 (Ct. App. 2018). Moreover, during the contested case hearing, the ALC verbally granted Respondents’ Motion for Summary Judgment, thereby rejecting Appellants’ NPDES CAFO argument. (R. p. 390). Appellants are not required to “engage in futile actions in order to preserve issues for appellate review. *Staubes v. City of Folly Beach*, 339 S.C. 406, 414-15, 529 S.E.2d 543, 547 (2000); *Fettler v. Gentner*, 396 S.C. 461, 469, 722 S.E.2d 26, 31 (Ct. App. 2012). This Court should hear and review Appellant’s NPDES CAFO argument.

Respondents also assert that Appellant's remaining issue on appeal is unpreserved for appellate review. Again, Appellant did raise to the ALC in a proposed order the issue of whether DHEC erred in interpreting S.C. Code Ann. 61-43 Part 200 in a manner that effectively avoided certain mandated assessments of a permit application. (R. p. 151 – 155; R. p. 159 – 162). By entering an order that was substantially the same as Respondents' proposed order, the ALC rejected Appellant's argument, thereby ruling on Appellant's issues. *See Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011) (finding issue preserved when judge reviewed competing arguments and rejected appellant's arguments); *Hardaway Concrete Co. v. Hall Contr. Corp.*, 374 S.C. 216, 225-26, 647 S.E.2d 488, 493 (Ct. App. 2007) (same). In addition, the ALC disposed of Appellant's argument by treating the issue as a question of fact rather than an issue of law. (R. p. 29 – 30). Appellants' second issue on appeal is preserved for review.

2. Permittees Misstate the NPDES Program in a Failed Effort to Support a Flawed Interpretation of Applicable Regulations.

Permittees assert that a NPDES CAFO permit authorizes discharges from a CAFO, yet an animal agricultural permit prohibits discharges. Therefore, under *Kiriakides v. United Artists Commc'ns*, 312 S.C. 271, 440 S.E.2d 364, 366 (1994), Permittees argue that requiring Large CAFOs to obtain an NPDES CAFO permit and an animal agricultural permit would yield a futile, absurd result that could not have been the intent of the regulations. This Court should reject Permittees' argument, for it fundamentally misstates the NPDES regulations and obscures the interrelationship between the State's NPDES regulations and animal agricultural regulations. Correcting for Permittees' errors, Permittees' analysis falls flat.

Under South Carolina's NPDES CAFO regulations, CAFOs are not authorized to discharge pollutants into waters of the State, as Permittees erroneously claim. Permittee Brief, p. 18. While

true that, generally speaking, NPDES permits authorize the discharge of pollutants after complying with treatment standards, CAFOs, however, are subject to special rules. Unlike other industries, the performance standard for a new NPDES CAFO permit is zero discharge.¹ S.C. Code Ann. Regs. 61-9.122.1(d)(2); 40 C.F.R. § 412.46(a). Large CAFOs are presumed to be dischargers of pollutants. S.C. Code Ann. Regs. 61-9.122.23(a). As such, they are required to either obtain a NPDES permit for the operation of their production area² or demonstrate to DHEC that the proposed operations have “no potential to discharge” of manure, litter or process wastewater.³ *Id.*; S.C. Code Ann. Regs. 61-9.122.23(d)(1) and (2); S.C. Code Ann. Regs 61-9.122.23(f)(1). If a Large CAFO cannot show that its operations will have no potential to discharge pollutants, then

¹ A CAFO in existence prior to the promulgation of currently effective performance standards is also subject to a zero discharge standard with the exception that wastewater may be discharged if precipitation causes an overflow of manure, litter or wastewater, so long as the CAFO has designed and constructed its production area to capture and contain all manure, litter and wastewater including the runoff and direct precipitation from a 25-year, 24-hour rainfall event. 40 C.F.R. § 412.31(a)(1). In other words, a preexisting CAFO can discharge pollutants only if it constructed an engineered means by which to contain rainwater and runoff from the barns, burial sites, and manure storage sites in a 25-year 24-hour storm event, and the runoff exceeds this design standard. Nothing in the State’s animal agricultural regulations come close to requiring this level of demonstrated containment of pollutants generated by poultry production areas. In any event, CAFOs that sought animal agricultural permits after 2003 are deemed “new sources.” S.C. Code Ann. Regs. 61-9.122.2; 40 C.F.R. § 412.31(a)(1). Permittees are unquestionably “new sources.”

² “Production area” is defined as:

that part of an AFO that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas. The animal confinement area includes but is not limited to open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milk rooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways, and stables. The manure storage area includes but is not limited to lagoons, runoff ponds, storage sheds, stockpiles, under-house or pit storages, liquid impoundments, static piles, and composting piles. The raw materials storage area includes but is not limited to feed silos, silage bunkers, and bedding materials. The waste containment area includes but is not limited to settling basins and areas within berms and diversions which separate uncontaminated storm water. Also included in the definition of production area is any egg washing or egg processing facility and any area used in the storage, handling, treatment, or disposal of mortalities. S.C. Code Ann. Regs 61-9.122.23(b)(8).

³ “Process wastewater” is defined as “water directly or indirectly used in the operation of the AFO for any or all of the following: spillage or overflow from animal or poultry water systems; washing, cleaning, or flushing pens, barns, manure pits, or other AFO facilities; direct contact swimming, washing, or spray cooling of animals; or dust control. Process wastewater also includes any water which comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs, or bedding.” S.C. Code Ann. Regs 61-9.122.23(b)(7).

it is subject to standards and limitations found within an individual or general NPDES permit. S.C. Code Ann. Regs. 61-9.122.23(d)(1). Thus, Permittees' attempt to present the relevant statutory schemes as conflicting or somehow incompatible necessarily fails. The State's NPDES CAFO regulation does not allow new sources to discharge into waters of the State. Permittees are not placed in an absurd or futile position of applying for one permit that prohibits discharges and another permit that allows discharges. Permittees' argument under *Kiriakides* is unavailing.

Likewise, Permittees' contention that DHEC's interpretation of the interrelationship between S.C. Code Ann. Regs. 61-43 Part 200 and S.C. Code Ann. Regs. 61-9.122.23 is "practical, reasonable and fair" simply does not stand up to the plain meaning of the regulations. This Court is "bound to give effect to the expressed intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "[I]t is not the court's place to change the meaning of a clear and unambiguous [regulation]." *Id.* Under S.C. Code Ann. Regs. 61-9.122.23(d):

- (1) All CAFO owners or operators must apply for a permit. All CAFO owners must seek coverage under an NPDES permit, except as provided in paragraph (d)(2) of this section. Specifically, the CAFO owner or operator must either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit. If the Department has not made a general permit available to the CAFO, the CAFO owner or operator must submit an application for an individual permit to the Department.
- (2) Exception. An owner or operator of a Large CAFO need not seek coverage under an NPDES permit otherwise required by this section once the owner or operator has received from the Department notification of a determination under paragraph (f) of this section that the CAFO has "no potential to discharge" manure, litter, or process wastewater.

The plain language of S.C. Code Ann. Regs 61-9.122.23(d) cannot be more clear. Permittees must apply for an NPDES permit or seek an exception under (d)(2). Nothing in S.C. Code Ann. Regs. 61-

9.122.23 provides an exception by virtue of obtaining an animal agricultural permit under S.C. Code Ann. Regs 61-43 Part 200. And the phrase “potential to discharge” must mean something different than “no discharge.” To interpret “no potential to discharge” as the same as “no discharge” impermissibly reads “no potential to discharge” out of the regulation, including the regulation’s mandatory notice and comment process for a “no potential to discharge” determination under S.C. Code Ann. Regs. 61-9.122.23(f)(3). Courts will not construe a regulation in a way that renders a phrase or paragraph meaningless. *State v. Cty. of Florence*, 406 S.C. 169, 174, 749 S.E.2d 516, 518 (2013). Under this Court’s rules of statutory construction, “no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.” *Prot. & Advocacy for People with Disabilities, Inc. v. Buscemi*, 417 S.C. 267, 274, 789 S.E.2d 756, 761 (Ct. App. 2016).

As an additional sustaining ground, Permittees argue that S.C. Code Ann. Regs 61-9.122.23 contravene and conflict with the Clean Water Act and the NPDES program, citing to *Waterkeeper Alliance v. EPA*, 399 F.3d 486 (2nd Cir. 2005). In *Waterkeeper*, the Second Circuit concluded that the EPA lacked authority to require an NPDES permit for potential discharges. *Id.* at 505. *Waterkeeper* is binding upon the EPA, not States. Under 33 U.S.C. § 1251(b) and 33 U.S.C. § 1370, States are recognized as having the primary responsibility to “prevent, reduce, and eliminate pollution,” and are expressly authorized to promulgate rules that exceed federal regulations. Therefore, States do not violate the CWA by promulgating NPDES regulations more stringent than the CWA. In response to *Waterkeeper* and a subsequent case *National Pork Producers Council v. U.S. EPA*, 635 F.3d 738 (5th Cir. 2011), the EPA revised its CAFO NPDES rule in a manner that, in effect, makes South Carolina’s NPDES CAFO rule more restrictive than the

federal rule. See 40 C.F.R. § 122.23. Contrary to Permittees' misplaced insistence that South Carolina must comply with the EPA's revised NPDES CAFO rule, the CWA encourages States to apply more restrictive rules. 33 U.S.C. § 1370; 40 C.F.R. § 123.1(i). Appellants are not attempting evade *Waterkeeper*, for *Waterkeeper* is not binding upon State NPDES regulations. *Waterkeeper* addresses the EPA's scope of authority, not South Carolina's scope of authority.

The State's NPDES regulations were promulgated under both the Clean Water Act and the South Carolina Pollution Control Act ("PCA"). S.C. Code Regs. 61-9.122.1(a). The PCA vests DHEC with "broad authority and power to regulate persons who may pollute the environment of the State of South Carolina." *Rock Hill v. S.C. Dep't of Health & Envtl. Control*, 302 S.C. 161, 164, 394 S.E.2d 327, 328 (1990). Under the PCA, DHEC "shall have authority to abate, control and prevent pollution." S.C. Code Ann. § 48-1-20 (emphasis added). Under S.C. Code Ann. § 48-1-50(5), DHEC is authorized to "develop a general comprehensive program for the abatement, control and prevention of air and water pollution." (emphasis added). The word "prevent" is ordinarily defined as to "keep (something) from happening or arising." NEW OXFORD AMERICAN DICTIONARY, 1384 (3rd ed. 2010). Indeed, under the public trust doctrine, DHEC must act to protect the State's navigable waters, including protection of water quality. See *Jowers v. S.C. Dep't of Health & Envt'l Control*, Op. No. 27725 (S.C. Sup. Ct. filed May 30, 2018) (Shearouse Adv. Sh. No. 22, p. 23-24).

In a similar case, *Mich. Farm Bureau v. Dep't of Envtl. Quality*, the Michigan Court of Appeals ruled that Michigan's pollution control law provided the State authority to require Large CAFOs to obtain an NPDES CAFO permit for "potential discharges" or otherwise seek a determination of "no potential to discharge." 292 Mich. App. 106, 137, 807 N.W.2d 866, 876 (2011). Like South Carolina's PCA, Michigan's statute authorized the State to prevent pollution.

Id. at 886. The Court defined “prevention” according to the word’s dictionary definition and concluded that the State’s regulatory requirement fell within the authority of state law. *Id.* at 886. The same conclusion is appropriate here. S.C. Code Ann. Regs. 61-9.122.23(d) stands as authorized under the PCA.

Permittees’ attempt to distinguish *Michigan Farm Bureau* is unavailing because they focus on inapplicable or irrelevant provisions of Michigan state law that were analyzed in the case. Permittees turn to language in the opinion that concern the State’s rulemaking authority, i.e., whether the Michigan agency possessed the authority to promulgate the NPDES CAFO rule. Permittees’ Brief, p. 28, *citing to* 292 Mich. App. 106, 137, 807 N.W.2d 866, 886 (2011). The court found that the agency possessed the discretion to promulgate such a rule. Respondents have not argued that DHEC lacks the authority to promulgate South Carolina’s NPDES CAFO rule. The discretion of the administering Michigan agency to promulgate the NPDES CAFO rule is a different question than what is relevant here – whether the PCA provides authority for South Carolina’s regulation requiring Large CAFOs to apply for an NPDES permit or demonstrate “no potential to discharge.” The answer to this question is yes, the NPDES CAFO rule plainly falls within the broad authority of the PCA to prevent pollution. Subsequent to the *Waterkeeper* decision issued in 2005, DHEC could have sought to amend or repeal the State’s CAFO NPDES regulation under the procedure required by S.C. Code Ann. § 1-23-110; however, DHEC has apparently chosen not to. DHEC’s inaction over the past 13 years arguably creates an inference that DHEC historically viewed the duty of Large CAFOs to apply for a NPDES permit as within the authority conferred by the PCA. *See Berkebile v. Outen*, 311 S.C. 50, 53, 426 S.E.2d 760, 762 (1993) (presuming that legislature’s silence after changes in related law means there was no need to revise statute).

3. DHEC's Attempt to Evade its Duty to Administer its NPDES CAFO Regulation Should Be Rejected by this Court.

DHEC asserts that enforcing the duty of Large CAFOs to apply for an NPDES CAFO permit or otherwise demonstrate “no potential to discharge” would violate a standard of reasonableness within the PCA. DHEC’s Brief, p. 41. DHEC complains that it is unreasonable to require Large CAFOs to apply for an NPDES CAFO permit because Large CAFOs would have a hard time obtaining a permit exemption under the “no potential to discharge” standard. Therefore, DHEC stands before this Court claiming that it can ignore its own regulation intended to protect public health, safety and welfare because Large CAFOs may actually have to obtain and comply with an NPDES CAFO permit. The State’s NPDES CAFO regulations are the law of South Carolina, and DHEC is required by law to enforce them. *See Sierra Club v. S.C. Dep’t of Health & Envtl. Control*, 414 S.C. 581, 620, 779 S.E.2d 805, 825 (Ct. App. 2015). “To allow otherwise would impede the purpose for which DHEC was created—to act in the public interest—and risk the health and safety of our citizens.” *Id.*

Moreover, it is not “impossible” for Permittees to show “no potential to discharge.” As the EPA explained, a CAFO could demonstrate “no potential to discharge” if their proposed site is located “at a great distance” from waterbodies. 68 FED. REG. 7176, 7200 (Feb. 12, 2003). Permittees’ proposed site has numerous intermittent or perennial streams and a wetland area, all draining into the nearby Little River. (R. p. 1245; R. p. 1256; R. p. 1359; R. p. 1362; R. p. 1517; R. p. 1525). However, Permittees could have chosen a site far away from rivers, streams and wetlands, which could meet the “no potential to discharge” standard. Also, Permittees could have avoided the duty to apply for an NPDES permit altogether by proposing to confine a number of birds less than the threshold for Large CAFOs. Confining less than 125,000 birds for 45 days or

more during any 12-month period would not meet the definition of CAFO at all unless actual discharges occur. S.C. Code Ann. Regs. 61-9.122.23(b)(6). DHEC should be more concerned about protecting the environment and public health and welfare rather than bemoaning the choices of Permittees that placed them in the predicament they are in.

4. Upon proper interpretation of S.C. Code Ann Regs. 61-43 Part 200, Respondents' ripeness argument fails.

Permittees argue that, even if they are required to obtain an NPDES CAFO permit, the issue is not ripe for consideration because they have 180 days prior to commencement of operations in which to apply for a permit. Permittees' Brief, p. 30, *citing to* S.C. Code Ann. Regs. 61-9.122.23(g)(4). Likewise, DHEC argues that Appellants' NPDES CAFO argument is "premature," citing to the same regulatory provision as well as S.C. Code Ann. Regs. 61-9.122.23(f)(2). DHEC Brief, p. 42. Respondents ignore provisions within the animal agricultural regulations that require an NPDES permit to be issued prior to or in conjunction with their animal agricultural permits. Under S.C. Code Ann. Regs. 61-43.200.50(B)(2)(a), an applicant seeking an animal agricultural permit must include in the application its NPDES permit if applicable. Because Permittees are Large CAFOs, they must apply for an NPDES permit or seek an exemption; thus, an NPDES permit is undoubtedly applicable to Permittees. Under S.C. Code Ann. Regs. 61-43.200.70(l), an animal agricultural permit must have a term of up to five years if the permittee is a CAFO as defined under the NPDES regulations. The Department's permit review checklist for agricultural animal permits require evidence of payment of the fee for an NPDES permit if the applicant is a Large CAFO. (R. p. 1675). In sum, the plain and unambiguous language of S.C. Code Ann. Regs. 61-43 Part 200 and the Department's own permit review checklist establish that an

NPDES CAFO permit is to be issued before or along with Permittees' agricultural animal permits.

Respondents' ripeness argument fails.

5. Respondents' Argument Concerning DHEC's Review of the Permits Avoids Appellants' Real Issue.

Appellants argue that DHEC erred by failing to provide proper evaluation of the Permittees' applications under S.C. Code Ann. Regs. 61-40 Part 200.140, Part 200.70(E), and (F). Specifically, Appellants contend that DHEC premised its permit evaluation on the "no discharge" performance standard, thereby avoiding mandatory consideration of any additional conditions or restrictions that may be required to actually meet the "no discharge" standard. Both Permittees and DHEC attempt to frame the issue of whether DHEC properly evaluated Permittees' permit applications as a question of fact. However, the issue here is a matter of construing the agricultural animal regulations. It is an error of law for DHEC to avoid consideration of additional permit conditions by adopting the flawed logic that the Permittees will not discharge because the permit prohibits discharges, therefore, DHEC need not consider additional permit requirements under S.C. Code Ann. Regs. 61-40 Part 200.140, Part 200.70(E), and (F). It should be of concern to this Court that DHEC reads S.C. Code Ann. Regs. 61-43 Part 200 in a manner that effectively erases mandates within S.C. Code Ann. Regs. 61-40 Part 200.140, Part 200.70(E), and (F) intended to fulfill the purpose of S.C. Code Ann. Regs. 61-43 to protect the environment and public health and welfare. DHEC is charged with applying its regulations, not avoiding them.

Permittees falsely claim that Appellants seek a presumption that agricultural animal permittees will violate the no discharge permit standard. Appellants argue nothing of the sort. Appellants simply point out that DHEC uses the presumption of permit compliance to dodge its

duty to examine the permit applications according to mandates set forth in S.C. Code Ann. Regs. 61-40 Part 200.140, Part 200.70(E), and (F). As explained above, the Department must evaluate certain factors or situations to determine if the proposed facilities warrant additional requirements or setbacks above and beyond the minimum criteria. Such an evaluation is intended to fulfill the Regulation's intended purpose of assuring that "no-discharge" occurs. Appellants ask that S.C. Code Regs. 61-43 Part 200 be interpreted and applied such that S.C. Code Ann. Regs. 61-40 Part 200.140, Part 200.70(E), and (F) are given effect, instead of DHEC's current practice of circumventing these provisions. *See Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, 407 S.C. 583, 597-98, 757 S.E.2d 408, 416 (2014) ("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.").

6. DHEC's Argument that the State's NPDES CAFO Rule is Unenforceable is Wholly Without Merit.

DHEC asserts for the first time that the State's NPDES CAFO is unenforceable based upon certain provisions of the Administrative Procedures Act ("APA"). The State's NPDES CAFO regulation was exempt from the legislature's review under S.C. Code Ann. § 1-23-120(H)(1) because regulations promulgated to maintain compliance with federal law are not required to undergo review and approval by the legislature. However, once the State's NPDES CAFO rule became more restrictive than the federal NPDES CAFO rule subsequent to *Waterkeeper*, DHEC argues that the State's NPDES CAFO regulations are no longer exempt from the legislature's review, thus rendering the regulation unenforceable. S.C. Code Ann. § 1-23-115(E)(1). Further, DHEC turns to S.C. Code Ann. § 1-23-120(H)(1), which states that if the federal law for which a

state regulation is enacted to maintain consistency is no longer valid, the regulation is deemed invalid upon the date that the agency publishes notice thereof in the State Register. DHEC Brief, p. 38. Under these provisions of the APA, DHEC argues that the NPDES CAFO regulation was promulgated to comply with the CWA, and that once the Second Circuit Court of Appeals ruled in 2005 that the EPA lacked authority to require Large CAFOs to apply for an NPDES permit for potential discharges, then the State's NPDES CAFO regulation ceased to be enforceable. This Court should reject DHEC's argument for several reasons.

First, this argument based upon the APA can only be seen as a post hoc rationalization in light of DHEC's previous written position provided to Appellants. In a letter to concerned citizens, DHEC acknowledged and explained (albeit incorrectly) its NPDES CAFO regulation, saying nothing about it being unenforceable. (R. p. 1662 – 1665). For DHEC to now argue before this Court that its NPDES CAFO regulations are unenforceable is simply not credible. Agency deference is not appropriate if the agency's interpretation conflicts with a prior interpretation or appears to be merely a "convenient litigating position." See *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012).

Secondly, South Carolina's NPDES rule was enacted pursuant to both the CWA and PCA. Vol. 27-12 S.C. REG. 60 (Dec. 26, 2003); S.C. Code Ann. Regs. 61-9 Part 122.1(a). At the time it was promulgated in 2003, the State's NPDES CAFO rule was the same as the EPA's NPDES CAFO rule; thus, an assessment report pursuant to S.C. Code Ann. § 1-23-115(E)(1) was unnecessary. Without citing any authority, DHEC suggests that once the "duty to apply" provisions of the EPA's CAFO rule was vacated in 2005 by the Second Circuit Court of Appeals in *Waterkeeper*, then South Carolina's NPDES CAFO rule violated S.C. Code Ann. § 1-23-115(E)(1) by virtue of lacking an

assessment report to the General Assembly when it was promulgated in 2003. The regulatory promulgation process provided within the APA applies at the time that regulations are promulgated. There is no authority whatsoever for the proposition that a regulation properly promulgated under S.C. Code Ann. § 1-23-115 may subsequently be deemed invalid due to changed circumstances that would have required an assessment report had the changed circumstance occurred at the time of promulgation. The APA governs the creation of regulations; once a regulation has been lawfully promulgated, S.C. Code Ann. § 1-23-115 does not reach back at a later time to invalidate previously promulgated regulations. *See e.g. Edwards v. State Law Enforcement Div.*, 395 S.C. 571, 579, 720 S.E.2d 462, 466 (2011) ("Absent a specific provision or clear legislative intent to the contrary, statutes are to be construed prospectively rather than retroactively, unless the statute is remedial or procedural in nature.").

Similarly, DHEC argues that S.C. Code Ann. Regs. 61-9.122.23 is no longer enforceable due to S.C. Code Ann. § 1-23-120(H)(1) which states that:

If the underlying federal law which constituted the basis for the exemption of a regulation from General Assembly review pursuant to this item is vacated, repealed, or otherwise does not have the force and effect of law, the state regulation is deemed repealed and without legal force and effect as of the date the promulgating state agency publishes notice in the State Register that the regulation is deemed repealed. The agency must publish the notice in the State Register no later than sixty days from the effective date the underlying federal law was rendered without legal force and effect.

On December 26, 2003, the State's NPDES CAFO regulation was promulgated to maintain consistency with the EPA's NPDES CAFO rule. The *Waterkeeper* court vacated the "duty to apply" provisions of the EPA CAFO rule on February 28, 2005. The above-stated S.C. Code Ann. § 1-23-120(H)(1) became effective on June 7, 2011. "Absent a specific provision or clear legislative intent to the contrary, statutes are to be construed prospectively rather than retroactively, unless the

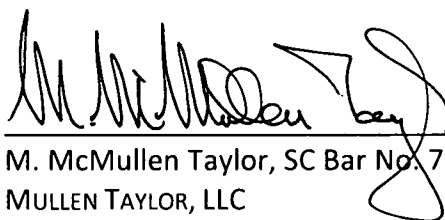
statute is remedial or procedural in nature.” *Edwards v. State Law Enforcement Div.*, 395 S.C. 571, 579, 720 S.E.2d 462, 466 (2011). The language of S.C. Code Ann. § 1-23-120(H)(1) does not contain a specific provision or clear legislative intent to apply retroactively. Indeed, the statute makes clear its prospective application, for it states that the promulgating agency must publish a notice no later than 60 days from the effective date of the invalidation of the underlying federal law. For any state regulation that may be based upon a federal rule vacated years before the enactment of S.C. Code Ann. § 1-23-120(h)(1), the promulgating state agency obviously cannot comply with this 60-day time period. Accordingly, S.C. Code Ann. § 1-23-120(H)(1) has prospective effect with no application to the State’s NPDES CAFO rule. The fact that DHEC has not published a notice in the State Register that S.C. Code Regs. 61-9.122.23 is repealed underscores the statute’s prospective effect.

Further, S.C. Code Ann. § 1-23-120 is not remedial or procedural in nature. “A statute is remedial where it creates new remedies for existing rights or enlarges the rights of persons under disability.” *Edwards v. State Law Enforcement Div.*, 395 S.C. 571, 579, 720 S.E.2d 462, 466 (2011). A statute is procedural in nature where it provides for a procedure in court or provides for a means to enforce a right.” *Id.* Although S.C. Code Ann. § 1-23-120(H)(1) is part of an Act governing administrative procedure, this specific provision’s requirement that state regulations be repealed impairs pre-existing rights and imposes a new obligation or duty. When a statute impairs pre-existing rights, or imposes new obligations or duties, the statute has prospective effect. *Edwards*, at 579, 466.

CONCLUSION

For these reasons as well as arguments raised in Appellants' Brief, this Court should hold DHEC and Permittees accountable to the plain language of the State's NPDES CAFO regulations and the agricultural animal regulations. "To allow otherwise would impede the purpose for which DHEC was created—to act in the public interest—and risk the health and safety of our citizens." *Sierra Club v. S.C. Dep't of Health & Env'tl. Control*, 414 S.C. 581, 620, 779 S.E.2d 805, 825 (Ct. App. 2015).

Respectfully Submitted,



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