THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2017-002598

ALC Case Nos. 17-ALJ-07-0041-CC; 17-ALJ-07-0040-CC; 17-ALJ-07-0039-CC

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;

Charles S. Blackmon and South Carolinians for Responsible Agricultural Practices. . . Appellants,

v.

South Carolina Department of Health and Environmental Control and Heath Coggins Broilers. . . . . Respondents;

Charles S. Blackmon and South Carolinians for Responsible Agricultural Practices. . . Appellants,

v.

South Carolina Department of Health and Environmental Control and Jim Young Broilers. . . . . Respondents.

JOINT PETITION FOR REHEARING

Mitchell Willoughby, S.C. Bar No. 6161
WILLOUGHBY & HOEFER, P.A
Post Office Box 8416
Columbia, South Carolina 29202
Telephone Number: 803-252-3300
mwilloughby@willoughbyhoefer.com

Attorneys for Respondents David Coggins Broilers, Heath Coggins Broilers, and Jim Young Broilers

Stephen Philip Hightower, S.C. Bar No. 72265
Sara V. Martinez, S.C. Bar No. 74822
SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
2600 Bull Street
Columbia, SC 29201
(803) 898-3350
hightosp@dhec.sc.gov
martinsv@dhec.sc.gov

Attorneys for Respondent S.C. Department of Health and Environmental Control

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Respondents David Coggins Broilers, Heath Coggins Broilers, and Jim Young Broilers ("Broilers") and the South Carolina Department of Health and Environmental Control ("SCDHEC") respectfully petition this Court for a rehearing of Opinion No. 5911 issued May 25, 2022 ("Opinion"). The basis for this petition is that the Opinion overlooks and misapprehends key points of law and substitutes the Court's judgment for that of the trial court as to the weight of evidence on findings of fact.

I. THE DEPARTMENT'S INTERPRETATION OF REGULATIONS 61-9.122.23 AND 61-43 PART 200 ARE ENTITLED TO DEFERENCE BECAUSE, IN DEALING WITH THE SAME SUBJECT MATTER, THE REGULATIONS READ TOGETHER ARE INHERENTLY AMBIGUOUS AND MUST BE READ TOGETHER TO PRODUCE A HARMONIOUS RESULT.

The Court's Opinion disregards critical rules of statutory and regulatory construction and, as a direct result, fails to give proper deference to the agency's interpretation of its own regulations dealing with the same subject matter and which are inherently ambiguous and create conflicting requirements on regulated entities. As noted by the ALC, "regulations that deal with the same subject matter are *in pari materia* and 'must be construed together, if possible, to produce a single, harmonious result.'" (R. p. 7–8 (citing *Grant v. City of Folly Beach,* 346 S.C. 74, 79, 551 S.E.2d 229, 231 (2001))); *see also Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000). The Court's decision in the instant matter, far from creating a single, harmonious reading of the two regulations at issue, dictates that the Department undertake a superfluous permitting decision for a regulated activity in direct conflict with the dictates of the first permitting decision.

The *Joiner* decision is instructive as a parallel to the instant case. *Joiner* concerned an action for termination of parental rights ("TPR") in a family court proceeding, and the construction of a statute mandating the appointment of a guardian *ad litem* in TPR actions, in light of the fact that a guardian had already been appointed to oversee the best interests of the child and had actually brought the petition for TPR. *Id.* The Court of Appeals read the statutory requirement under the TPR statute as requiring that a new guardian *ad litem* be appointed for purposes of the TPR action. *Id.* at 106–07, 536 S.E.2d at 374. The Supreme Court, holding that the TPR statute and a separate section authorizing a guardian to petition the court for relief on behalf of the child could be read harmoniously, determined that the appointment of an additional guardian *ad litem* would be "superfluous and not in keeping with a liberal construction designed to promptly effectuate the purposes of the TPR statutes." *Id.* at 109, 536 S.E.2d at 375.

In the instant case, the Department was charged with the construction and implementation of two distinct regulations, both dealing with the operations of an agricultural animal facility—Regulation 61-43 Part 200, addressing standards for permitting agricultural animal facilities (other than swine)[1], and Regulation 61-9.122.23, addressing wastewater discharges from Concentrated Animal Feeding Operations ("CAFOs"). Regulation 61-43 dictates that such facilities shall produce "no discharge of pollutants from the operation into surface Waters of the State (including ephemeral and intermittent streams)." R.61-43 Part 200.140.[2] Regulation 61-9.122.23, on its face,

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[1] For brevity, the facilities covered by R.61-43 Part 200 are referred to hereinafter as "animal facilities."

[2] In fact, Regulation 61-43 contains a plethora of protections and standards designed to prevent discharge from animal facilities, including setback and siting requirements, specific engineering and design requirements for the treatment of waste, and monitoring

requires operators to seek a permit to discharge wastewater, even though such a permit would directly violate R.61-43 and any permit issued thereunder. An exception is provided under Regulation 61-9.122.23 for CAFO owners that have received "notification of a determination . . . that the CAFO has 'no potential to discharge' manure, litter, or process wastewater." R. 61-9.122.23(d)(2).

It is clear that the Department cannot issue a permit to discharge and a "no discharge permit" to the same facility, as the actions would inherently conflict and subject facilities to illogical and contradictory compliance requirements. Similarly, as the ALC noted, since the Department must presume permit requirements will be observed, "the Department would be unable to find a potential to discharge at such a facility because it must presume that no discharge will occur there." (R. p. 11 n.4). Thus, the inquiry under Regulation 61-9.122.23(d)(2) can only lead to a single result that would conform with the parallel requirements of R.61-43 Part 200. It is also clear from a close reading of both regulations that neither the granting of a "no potential to discharge" determination, nor the issuance of a "no discharge permit" grants a regulated facility immunity from enforcement for an actual discharge or otherwise diminishes the Department's enforcement authority should an actual discharge take place. *See, e.g.*, R.61-43 Part 200.140(D), (G), Part 200.200; R.61-9.122.23(f)(5). The same ultimate result occurs whether the Department issues a single decision under R.61-43 or two decisions under both Regulations. Thus, the issuance of two distinct regulatory decisions

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and testing requirements which must be observed by the operators of animal facilities. *See, e.g.*, R.61-43 Part 200.80, Part 200.90. And, of course, the Department has the authority under the Regulation to "impose additional or more stringent requirements for the management, handling, treatment, storage, or utilization of animal manure and other animal by-products." R.61-43 Part 200.140(B).

to the same facility would render one decision either meaningless or superfluous, which result could not have been intended by the Legislature. *See Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C 271, 275, 440 S.E.2d 364, 366 (1994). Thus, the two regulations, when read together as they must be, create ambiguity.

In the face of this ambiguity, the Department construed R.61-43—a regulation which includes robust requirements for facility setbacks, manure management, and other environmental protections—as including a "no potential to discharge" determination under Regulation 61-9.122.23. This creates a single, harmonious reading of the two regulations at issue and prohibits a discharge of pollutants into surface Waters of the State. Our courts are charged to defer to an agency's interpretation of its own regulations "unless there is a compelling reason to differ." *S.C. Coastal Conservation League v. S.C. Dep't of Health & Env't Control*, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005); *see also, e.g., Barton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 404 S.C. 395, 415, 745 S.E.2d 110, 121 (2013) (stating that an agency's interpretation "will not be overruled absent compelling reasons.").

The Opinion in this case reads Regulation 61-9.122.23 in a vacuum, without appropriately applying the doctrine of *in pari materia.* The Court erred by concluding that the Department's interpretation of the two regulations is contrary to the plain language of Regulation 61-9.122.23, in part because the Court failed to read that regulation in conjunction with Regulation 61-43 Part 200 and give appropriate deference to the agency charged with implementing each of those regulations harmoniously. The ALC's deference to the Department on this issue was appropriate and should have been upheld.

II. THE COURT IMPROPERLY CONSTRUED REGULATION 61-9.122.23 UNDER THE POLLUTION CONTROL ACT AND FAILED TO GIVE EFFECT TO THE INTENT OF THE LEGISLATURE UNDER REGULATION 61-43.

The Court also disregarded the legal effect of both the Second Circuit Court of Appeals' decision in *Waterkeeper Alliance, Inc. v. U.S. Environmental Protection Agency*, 399 F.3d 486 (2d. Cir. 2005), and the adoption of state regulatory requirements more stringent than the CAFO provisions of Regulation 61-9—that is, Regulation 61-43 Part 200.

As recognized in the Opinion, in *Waterkeeper*, the Second Circuit "concluded that, with respect to CAFOs, unless there is a discharge of any pollutant, there is no violation of the [Clean Water] Act, and point sources are, accordingly, . . . [not] statutorily obligated to seek or obtain an NPDES permit." Opinion at 13 (internal citations omitted). Nonetheless, the Court found that *Waterkeeper* is not controlling, in part because Regulation 61-9.122.23 has not changed since the 2005 *Waterkeeper* decision[3], and in part because the South Carolina Regulation implements elements of both the Clean Water Act and the South Carolina Pollution Control Act ("PCA"), and the PCA grants the Department additional authority above what is conveyed by the Clean Water Act. This finding, however, is not supported by the intent of the Legislature which can be constructed from the legislative history of Regulation 61-9.122.23 and Regulation 61-43 Part 200.

It is axiomatic that the first rule of statutory and regulatory construction is to ascertain and give effect to the intent of the Legislature. *Grant*, 346 at 79, 551 S.E.2d at

[3] As pointed out in the Department's Final Brief, state law at the time of the *Waterkeeper* decision made no provision for the repeal of a regulation promulgated to comply with federal law that is no longer enforceable because of a change in the underlying federal law. Department Final Brief at 20 n.15 (citing S.C. Code Ann. § 1-23-120).

231; *Joiner*, 342 S.C. at 108, 536 S.E.2d at 375. While Regulation 61-9.122 implements elements of both the Clean Water Act and the PCA (*see* R.61-9.122.1(a)(1)), neither the regulatory language nor the legislative history (and lack of legislative review) associated with Regulation 61-9.122.23 evidence an intent by the Legislature to exceed the wastewater regulatory requirements necessary to maintain consistency with federal law.[4] Indeed, while the PCA, at Section 48-1-20, states a general policy that the Department has the authority to abate, control, and prevent pollution, that provision is nowhere cited as authority under the NPDES regulations. *See* R.61-9.122.1(g). What *is* repeatedly cited as authority for the NPDES regulations are specific provisions of the Clean Water Act itself, the benefits of which the PCA gives the Department the statutory authority to secure to the State using "all action necessary and appropriate." S.C. Code Ann. § 48-1-50(17); *see also* R.61-9.122.1(g)(1)–(10). To the extent there is evidence sufficient to ascertain and effectuate the legislative intent behind R.61-9.122.23, the most logical conclusion is that put forward by the Department in its Final Brief—that the pre-*Waterkeeper* federal CAFO rule promulgated by the EPA was adopted by the state to maintain consistency with federal law, and nothing more. Final Brief of Department at 17–18; *see also* 27 S.C. Reg. 50 (Dec. 23, 2003) (stating that the regulatory amendments are promulgated to maintain consistency with federal regulations and do not require legislative review).

[4] While the Court determined that the Department's arguments related to the lack of legislative approval for R.61-9.122 were raised for the first time on appeal and therefore should not be considered, it is clear that in the absence of such legislative review, effecting legislative intent is problematic, at best. On this basis at least, the additional sustaining ground should have been considered.

By contrast, the legislative intent of Regulation 61-43 Part 200 is ascertainable as it relates to animal facilities, since this regulation was actually reviewed by the Legislature, and the purpose of the regulation is plainly stated, in part, "[t]o establish standards for the growing or confining of animals, processing of animal manure and other animal by-products, and land application of animal manure and other animal by-products *in such a manner as to protect the environment, and the health and welfare of citizens of the State from pollutants generated by this process*." R. 61-43 Part 200.10(A)(1) (emphasis added). Regulation 61-43 Part 200 sets forth comprehensive requirements for such facilities, which includes and encompasses discharge limitations through the "no discharge" provision in Part 200.140. This provision creates a more stringent wastewater discharge requirement than even the pre-*Waterkeeper* federal CAFO regulations. Under Part 200.140, these facilities cannot discharge, period. Under the CAFO regulations, discharges are permissible. The legislative intent which can be ascertained from a complete reading of Regulation 61-43 Part 200 is that agricultural facilities are intended to be comprehensively regulated under this more stringent standard. The Department's interpretation of the regulations at issue, incorporating the "no potential to discharge" element of Regulation 61-9.122.23 into the comprehensive permitting decision of Regulation 61-43, effectuates the ascertainable intent of the Legislature. The Court's decision, which requires a superfluous permitting analysis under R.61-9.122.23, neither attempts to ascertain the intent of the General Assembly, nor gives effect to that intent, and is consequently in error.

III. THE COURT ERRED IN FINDING THAT THE DEPARTMENT DID NOT COMPLY WITH CERTAIN PERMIT EVALUATION CRITERIA WITHIN PART 200 OF REGULATION 61-43, AND IN FAILING TO GIVE APPROPRIATE DEFERENCE TO AGENCY INTERPRETATION OF THOSE CRITERIA.

The Court's determination that the ALC erred in accepting DHEC's interpretation of setback requirements under Regulation 61-43 Part 200.70(E) and (F) and Part 200.140(B) and (C) was itself in error, in that it misapprehended facts in the record on appeal, improperly substituted its own determination of the facts for the ALC's, and failed to appropriately defer to the agency in implementing its own regulations. Regulation 61-43 Part 200.140(B) provides the Department with the discretion to impose more stringent requirements on a facility on a case-by-case basis, and subsection (C) requires that facilities and manure utilization areas upstream of an impaired waterbody "shall be evaluated for additional or more stringent requirements[.]" Regulation 61-43 Part 200.140 does not mandate additional or more stringent requirements or prescribe the nature of the evaluation.[5] Nonetheless, the record in this matter makes clear that the Department did perform such an evaluation and that the evidence established that no such contribution to an impaired waterbody would occur.

The proposed agricultural facilities are located in the same watershed as the Little River, an impaired waterbody with a Total Maximum Daily Load ("TMDL") for fecal coliform. The proposed facilities are each sited to "well exceed the minimum setback requirements" such that that additional or more stringent requirements contemplated by

[5] 2018 Act No. 139 amended S.C. Code Ann. § 46-45-80 to provide that, as long as minimum setback distances set forth in R. 61-43 are achieved, "the [D]epartment may not require additional setback distances. While this provision was not in force or effect at the time of the permit decisions at issue in this case, the statutory amendment effectively moots Appellants' arguments regarding the evaluation for additional setback requirements.

the Regulation are already in place. (R. p. 30). The record clearly establishes that the Department reviewed the 2004 watershed report upon which the TMDL was based, and determined the county wastewater facility—not agricultural facilities—was the greatest contributor of fecal coliform to the watershed. (R. p. 1183, lines 13–17). The Department's agricultural permit writer also consulted with the watershed manager for the Little River, who confirmed that no additional setbacks were required for these facilities. (R. p. 1166, lines 8–23). The Department review under R.61-43 also included a review of the applicants' manure management plans and the applicants' arrangements with manure brokers. (R. p. 1167, lines 3–19). As the ALC noted, "[b]ecause manure will not be disposed of or discharged from the proposed Project sites, the Projects will have no impact on the Little River as an impaired water body." (R. p. 23).

Despite the record and the findings of the ALC, the Court determined that the Department failed to "meaningfully evaluate" the factors set forth in Regulation 61-43 Part 200.70 and 200.140. However, "[t]he court may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact." *Barton*, 404 S.C. at 401, 745 S.E.3d at 113; *see also* S.C. Code Ann. §1-23-610(B). In a *de novo* hearing before the ALC, that court determined that the Department appropriately evaluated the need for additional measures and made factual findings that the projects would not contribute pollutants to impaired waters. The Court, while framing the issue as an error of law, substituted its factual judgment for that of the ALC on the subjective issue of the *quality* of the Department's evaluation of the need for additional or more stringent requirements. Stated otherwise, the Court disagreed with the ALC on the weight of evidence supporting the Department's evaluation. Moreover, the Department was

entitled to deference in how it interpreted its evaluative duties under this regulatory provision, and Appellants, who bore the burden of persuasion at the ALC, offered no "compelling reason to differ" from the agency's interpretation, nor is such a reason apparent in the record. *S.C. Coastal Conservation League*, 363 S.C. at 75, 610 S.E.2d at 486. The ALC's judgment on this issue should have been upheld.

IV. CONCLUSION

For the foregoing reasons, Respondents Broilers and SCDHEC respectfully request rehearing from this Court.

Respectfully submitted,

August 10, 2022

s/Mitchell Willoughby

Mitchell Willoughby, S.C. Bar No. 6161
WILLOUGHBY & HOEFER, P.A
Post Office Box 8416
Columbia, South Carolina 29202
Telephone Number: 803-252-3300
mwilloughby@willoughbyhoefer.com

Attorneys for Respondents David Coggins Broilers, Heath Coggins Broilers, and Jim Young Broilers

s/Sara V. Martinez

Stephen Philip Hightower, S.C. Bar No. 72265
Sara V. Martinez, S.C. Bar No. 74822
SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
2600 Bull Street
Columbia, SC 29201
(803) 898-3350
hightosp@dhec.sc.gov
martinsv@dhec.sc.gov

Attorneys for Respondent S.C. Department of Health and Environmental Control

THE STATE OF SOUTH CAROLINA
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APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

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ALC Case Nos. 17-ALJ-07-0041-CC; 17-ALJ-07-0042-CC; 17-ALJ-07-0039-CC

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PROOF OF SERVICE

This is to certify that I, a paralegal with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of Respondents David Coggins, Heath Coggins Broilers, and Jim Young Broilers', and Respondent South Carolina Department of Health and Environmental Control's Joint Petition for Rehearing via first-class mail and electronic mail to the email addresses reflected in the Attorney Information System and as set forth below:

Robert Guild, Esquire
Robert Guild, Attorney at Law
314 Pall Mall Street
Columbia, SC 29201
bguild@mindspring.com

Stephen P. Hightower, Esquire
Sara V. Martinez, Esquire
South Carolina Department of Health and Environmental Control
2600 Bull Street
Columbia, SC 29201
hightosp@dhec.sc.gov
martinsv@dhec.sc.gov

A copy of the email serving counsel as stated above is attached hereto as Exhibit 1.

Elizabeth Kurtz

August 10, 2022
Columbia, South Carolina

WILLOUGHBY & HOEFER, P.A.

ATTORNEYS & COUNSELORS AT LAW

MITCHELL M. WILLOUGHBY
JOHN M.S. HOEFER
ELIZABETH ZECK*
ELIZABETHANN L. CARROLL
ANDREW J. D'ANTONI
R. WALKER HUMPHREY, II**
ANDREW R. HAND***
MARGARET M. O'SHIELDS

ELIZABETH S. MABRY
J. PATRICK HUDSON
OF COUNSEL

*ALSO ADMITTED IN TEXAS
**ALSO ADMITTED IN CALIFORNIA
***ALSO ADMITTED IN NORTH CAROLINA

August 10, 2022

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201
ctappfilings@sccourts.org

RE: *Charles S. Blackmon v. SCDHEC*, Appellate Case No. 2017-002598

Dear Ms. Kitchings:

Attached for filing pursuant to Rules 221, 240, and 262, SCACR, Respondents respectfully submit their Joint Petition for Rehearing in this matter. By copy of this letter, we are serving counsel for Appellants via first-class mail, and also by email as permitted by Order 2022-05-06-03, part (d)(1), and attached is a proof of service to that effect.

A check in the amount of $50.00 for the filing fee associated with this petition is enclosed herewith.

If you have any questions or need additional information, please do not hesitate to contact me.

Very truly yours,

WILLOUGHBY & HOEFER, P.A.

Mitchell Willoughby

Mitchell Willoughby

MW/epk
Attachments

cc: Robert Guild, Esquire (via U.S. Mail and email)
Stephen P. Hightower, Esquire (via U.S. Mail and email)
Sara V. Martinez, Esquire (via U.S. Mail and email)

HAND DELIVERY

WILLOUGHBY & HOEFER, P.A.
ATTORNEYS AT LAW
POST OFFICE BOX 8416 • COLUMBIA, SC 29202-8416

TO:

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201