

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM THE ADMINISTRATIVE LAW COURT **SC Court of Appeals**

The Honorable Ralph King Anderson, III
Administrative Law Judge

Case No. 2017-002598

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.

RETURN TO JOINT PETITION FOR REHEARING

In accordance with the Court's request of September 6, 2022, the Appellants, Charles S. Blackmon, *et al.* hereby submit this return to Respondents' Joint Petition for Rehearing. Where Respondents have failed to demonstrate any instance where the Court's Opinion No. 5911 overlooks or misapprehends key points of law, improperly substitutes its judgement for the Administrative Law Court or otherwise demonstrates any substantial basis for rehearing, the Joint Petition for Rehearing should be denied pursuant to Rule 221(a) of the South Carolina Appellate Court Rules.

1. The Court's Opinion properly applied rules of statutory construction to the plain and unambiguous DHEC Regulations for the permitting of large Concentrated Animal Feeding Operations (CAFOs), R. 61-9.122.23 and Agricultural Animal Facilities 61-43.200; properly concluding that DHEC failed to require either a permit or an exemption determination pursuant to R. 61-9.122.23(d); and failed to consider the factors set forth in R. 61-43.200 for permitting these 18 new poultry broiler houses on a 255 acre tract adjacent to the already impaired waters of the Little River in the Mountville community of Laurens County.

The subject regulations, read together as written, given their plain and unambiguous meaning, already produce a harmonious result empowering DHEC to effectively regulate, prevent and remediate water pollution from large CAFOs. Large CAFOs, as here, generate larger quantities of animal manure from their larger concentration of animals than smaller facilities and presumptively pose greater threats of discharge of manure to waters of the state. R. 61-9.122.23(a). R. 61-9 addresses this threat by imposing a National Pollution Discharge Elimination System (NPDES) permit

requirement to prevent or limit discharges or an exemption from such permitting upon a facility-specific demonstration of “no potential to discharge” based on the specific conditions of the proposed facility which may offer the needed pollution prevention controls. Such measures embodied in R. 61-9 fully comport with and are harmonious with DHEC’s base agricultural animal permitting regulations, 61-43, which do not purport to expressly address or distinguish the enhanced manure discharge hazard posed by large CAFOs. The Court’s opinion here ably harmonized these regulations employing their plain language while rejecting DHEC’s abdication of its duty to enforce both. *State v. Cty of Florence*, 406 S.C. 169, 174, 749 S.E. 2d 516, 518 (2013); *Prot. & Advocacy for People with Disabilities, Inc. v. Buscemi*, 417 S.C. 267, 274, 789 S.E.2d 756, 761 (Ct. App. 2016).

2. The Court’s Opinion properly construed DHEC’s Large CAFO regulation, R. 61-9.122.23, as fully authorized by both federal and state pollution control laws, empowering the State to adopt more stringent measures as needed for the protection of our environment, notwithstanding the 2005 *Waterkeeper* decision limiting federal authority over large CAFOs under the federal Clean Water Act. DHEC failed to either revise or repeal its Large CAFO regulation for some 16 years after *Waterkeeper*. The Court properly concluded that DHEC remained obligated to apply its regulation, R. 61-9.122.23, to these proposed large CAFOs by either requiring NPDES permits or determining they were exempt from such permitting by a demonstration that they have

“no potential to discharge” poultry manure to the “waters of the State under any circumstances or climactic condition.” R. 61-9.122.23 (f)(1).

Perhaps most indicative of the validity of the Court’s opinion here, is DHEC’s subsequent and recent move to repeal or revise its large CAFO regulation, 61-9, after languishing unenforced for those 16 years since the decision in *Waterkeeper*. Without acknowledging and, indeed, contrary to this Court’s Opinion in *Blackmon*, DHEC only now seeks to summarily repeal this regulation without subjecting its action to legislative review citing the purported need to achieve “compliance with federal law.” Notice of Proposed Regulation Amending R.61-9, Water Pollution Control Permits, Exhibit 1, attached hereto. This Court Opinion here expressly rejected DHEC’s assertion that its Large CAFO regulation was founded solely on federal law:

The South Carolina regulations at issue are based not only on the federal NPDES regulations but also upon the South Carolina Pollution Control Act, which specifically authorizes the Department to “prevent pollution.” (Citing R. 61-9.122.1(a)(1) and S.C. Code Ann. Sec. 48-1-20).

Opinion No. 5911, at 11. The procedural validity of DHEC’s proposed regulatory revision, as well as its wisdom on the merits is the subject of formal comments and objections by a number of conservation organizations. Exhibit 1, page 14.

Tellingly, DHEC asserts that this regulatory revision “will increase the efficiency of processing facility applications, which will be a benefit to the regulated community” and “will result in cost savings to the regulated community” with “continued protection of the environment and human health . . .” Statement of Need and Reasonableness,” Exhibit 1, p.3.

3. The Court's opinion properly concluded that DHEC failed to evaluate the site-specific water pollution threats presented by these proposed large CAFOs to be located very near the fecal bacteria impaired waters of the Little River contrary to the explicit requirements of Regulation R. 61-43.200. As cited by the Court, DHEC's Agricultural Animal Permitting Regulations require it to "act on all permits to prevent, so far as reasonably possible . . . an increase in pollution of the waters and air of the State from any new or enlarged sources," R. 61-43.200.70(E), with authority "(O)n a case-by-case basis" to "impose additional or more stringent requirements for the management, handling, treatment, storage, or utilization of animal manure and other animal by-products." R. 61-43.200.140(B). The regulation explicitly requires consideration of imposing more stringent permit conditions under the very circumstances presented by these proposed large CAFOs: location in the impaired Little River watershed:

The following cases shall be evaluated for additional or more stringent requirements:

....

2. 303(d) Impaired Waterbodies List. Facilities and manure utilization areas located upstream of an impaired waterbody.

R. 61-43.200.140C.

To such explicit regulatory commands, DHEC's singular and persistent response is that these CAFOs are deemed to be "no discharge" facilities which, therefore, by mere declaratory fiat will not and cannot discharge animal manure into the waters of the State. No further inquiry or evaluation for more stringent permit requirements is needed. No account taken of the proposed 18 barns' proximity to the adjacent impaired Little River or to the discharge of animal manure from these facilities on land or "manure utilization

areas” located in the Little River watershed. The Court properly concluded that such evasion by DHEC represented a failure to enforce the explicit, plain and unambiguous permit evaluation requirements of its own regulations, requiring reversal and remand for further proper evaluation.

Respondents grossly mischaracterize the record in their claims that DHEC conducted any substantive site-specific evaluation of the subject permits in light of their proposed location in the impaired Little River watershed. No such evaluation was deemed permissible given DHEC’s clearly erroneous interpretation of its regulations characterizing all agricultural animal facilities as “no discharge” facilities, in effect as a matter of law. The DHEC permit reviewer repeatedly confirmed that the “no discharge” characterization precluded such evaluation. The no discharge standard was understood to mean that there would be no discharge, and, therefore, no need to consider such facility as contributing to impaired water quality in the Little River, despite the location in the watershed and the explicit regulatory requirements. R. 1184, Lines 1-15. R. 1669-70; R. 1680-81; R. 1691-92. Such willful blindness to the pollution threats posed by these proposed facilities persisted despite the presence of some 167 existing permitted animal manure disposal sites in the Little River watershed, R. 1200, Lines 25- 1201, Line 3; repeated documentation of uncovered manure piles at existing poultry barns in the vicinity, R. 1193, Lines 20- 1194, Line 19; proposed reliance by the facilities on manure brokers for animal manure disposal with no land application reporting requirements, R. 1168, Lines 7-15; and these proposed CAFO barn locations on sites with numerous streams and a wetland all draining to the nearby Little River. R. 1245, 1256, 1359, 1517

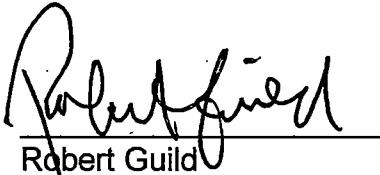
and 1525. DHEC's Little River TMDL analysis determined that a reduction of fecal bacteria loading of up to 78% was required in order to achieve the "recreational use" water quality standard to make the Little River 'fishable and swimmable' again. R. 1203, Lines 14-19.

DHEC's improper presumption that CAFOs or agricultural animal facilities will not discharge animal manure waste into our rivers and streams, contributing to their pollution, their listing as legally impaired and posing hazards to human health, is a clear dereliction of its regulatory duty. It also defies logic and common sense. We purport to regulate CAFOs because they do generate vast quantities of animal manure which must be managed with sufficient care to assure that such manure from its generation in the large confinement barns to its land application or "utilization" on fields is prevented from washing into our rivers and streams. Magical declarations that CAFOs are deemed "no discharge" facilities which cannot contribute to a TMDL or water quality impairment provide no environmental protections whatsoever regardless of circumstances.

CONCLUSION

For the foregoing reasons the Joint Petition for Rehearing should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert Guild", is written over a horizontal line.

Robert Guild

S.C. Bar No. 2358

314 Pall Mall Street

Columbia, SC 29201

Attorney for Appellants

Charles S. Blackmon and

South Carolinians for Responsible Agricultural Practices

September 16, 2022

(x) ACTION/DECISION
() INFORMATION

Date: September 8, 2022

To: S.C. Board of Health and Environmental Control

From: Bureau of Water

Re: Notice of Proposed Regulation Amending R.61-9, Water Pollution Control Permits

I. Introduction

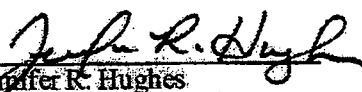
The Bureau of Water ("Bureau") proposes the attached Notice of Proposed Regulation amending R.61-9, *Water Pollution Control Permits*, for publication in the September 23, 2022, *South Carolina State Register* ("State Register"). Legal authority resides in the South Carolina Pollution Control Act, S.C. Code Ann. 48-1-10 et seq., which authorizes the Department of Health and Environmental Control ("Department") to establish programs to regulate discharges from point sources, including concentrated animal feeding operations. The Administrative Procedures Act, S.C. Code Section 1-23-120(H)(1), exempts this amendment from General Assembly review, as the Department proposes amendment for compliance with federal law.

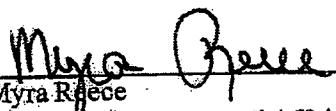
II. Facts

1. Regulation 61-9.122.23, Concentrated Animal Feeding Operations (CAFOs), provides the definition of a CAFO and provides the National Discharge Pollution Elimination System (NPDES) permitting requirements for CAFOs. The Department proposes amending R.61-9.122.23 to maintain consistency with the current federal regulation in Title 40, Part 122 of the Code of Federal Regulations (40 CFR Part 122), Subpart B, Section 23, *Concentrated animal feeding operations*.
2. The Department had a Notice of Drafting published in the July 22, 2022, *State Register*. A copy of the Notice of Drafting appears herein as Attachment B. The Department received public comments from one group on behalf of several groups by the August 22, 2022, close of the public comment period. Attachment C presents a summary of these public comments received and Department responses.
3. The Bureau provided notice to interested parties via an email list on July 22, 2022.
4. Appropriate Department staff conducted an internal review of the proposed amendments on August 4, 2022.

III. Request for Approval

The Bureau respectfully requests the Board to grant approval of the attached Notice of Proposed Regulation for publication in the September 23, 2022, *State Register*.


Jennifer R. Hughes
Bureau Chief, Bureau of Water


Myra Rejee
Director, Environmental Affairs

Attachments:

- A. Notice of Proposed Regulation
- B. Notice of Drafting published in the July 22, 2022, *State Register*
- C. Summary of Public Comments Received and Department Responses
- D. Southern Environmental Law Center Comment Letter, August 25, 2022

ATTACHMENT A

STATE REGISTER NOTICE OF PROPOSED REGULATION FOR R.61-9, WATER POLLUTION CONTROL PERMITS

September 8, 2022

Document No. _____

DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

CHAPTER 61

Statutory Authority: 1976 Code Sections 48-1-10 et seq.

61-9. Water Pollution Control Permits.

Preamble:

Pursuant to the South Carolina Pollution Control Act, S.C. Code Ann. 48-1-10 et seq., the Department of Health and Environmental Control ("Department") establishes programs to regulate discharges from point sources, including concentrated animal feeding operations. The Department proposes amending R.61-9.122.23, Concentrated Animal Feeding Operations, for conformity with the current federal regulation in Title 40, Part 122 of the Code of Federal Regulations (40 CFR Part 122), Subpart B, Section 23, *Concentrated animal feeding operations*. The Administrative Procedures Act, S.C. Code Section 1-23-120(H)(1), exempts this amendment from General Assembly review, as the Department proposes this amendment for compliance with federal law.

The Department had a Notice of Drafting published in the July 22, 2022, South Carolina State Register.

Section-by-Section Discussion of Proposed Amendments:

Section	Type of Change	Purpose
(a)	Revision	Amended to clarify references, permitting requirements, and feeding operations.
(b)(1)	Revision Reorganization	Amended for clarity; recodified items.
(b)(2)	Reorganization	Amended to add recodified (a)(1)(ii).
(b)(4)	Technical Correction	Amended to correct punctuation.
(b)(6)	Technical Correction	Amended to correct punctuation.
(b)(6)(ii)	Revision	Amended to clarify U.S. waters.
(b)(8)	Technical Correction	Amended to correct spelling.
(b)(9)	Technical Correction	Amended to correct punctuation and grammar.
(c)(1)	Revision Addition	Amended for clarity.
(c)(2)	Revision	Amended to clarify U.S. waters.
(c)(3)	Revision Technical Correction	Amended to clarify U.S. waters and to correct punctuation.
(d)(1)-(2)	Revision	Amended to comply with federal law.

(e)	Revision	Amended to clarify U.S. waters.
(e)(1)-(2)	Addition	Added to comply with federal law.
(f)-(h)	Deleted	Deleted to replace with current federal law.
New (f)	Addition	Added permit coverage requirement to comply with federal law.
New (g)	Addition	Added as reserved to comply with federal law.
New (h)	Addition	Added procedures for permit coverage to comply with federal law.

Notice of Public Hearing and Opportunity for Public Comment:

Interested persons may submit comment(s) on the proposed amendment to Joseph M. Koon of the Bureau of Water; S.C. Department of Health and Environmental Control, 2600 Bull Street, Columbia, S.C. 29201; koonjm@dhec.sc.gov. To be considered, the Department must receive the comment(s) by 5:00 p.m. on October 24, 2022, the close of the comment period.

The S.C. Board of Health and Environmental Control will conduct a public hearing on the proposed amendment during its December 8, 2022, 10:00 a.m. meeting. Interested persons may make oral and/or submit written comments at the public hearing. Persons making oral comments should limit their statements to five (5) minutes or less. The meeting will take place in the Board Room of the DHEC Building, located at 2600 Bull Street, Columbia, S.C. 29201. Due to admittance procedures, all visitors must enter through the main Bull Street entrance and register at the front desk. The Department will publish a meeting agenda twenty-four (24) hours in advance indicating the order of its scheduled items at: <http://www.scdhec.gov/Agenda>. Public hearing procedures are subject to change in response to COVID-19 protocols. If applicable, the Department will provide notice of these changes twenty-four (24) hours in advance of the public hearing.

The Department publishes a Monthly Regulation Development Update tracking the status of its proposed new regulations, amendments, and repeals and providing links to associated State Register documents at <http://www.scdhec.gov/Agency/RegulationsAndUpdates/RegulationDevelopmentUpdate/>.

Statement of Need and Reasonableness

The following presents an analysis of the factors listed in 1976 Code Sections 1-23-115(C)(1)-(3) and (9)-(11):

DESCRIPTION OF REGULATION: R.61-9.122.23, Concentrated Animal Feeding Operations

Purpose: The Department proposes amending R.61-9.122.23, Concentrated Animal Feeding Operations, to maintain consistency with the federal regulation at 40 CFR Section 122.23.

Legal Authority: 1976 Code Sections 48-1-10 et seq.

Plan for Implementation: The proposed amendment will take legal effect upon publication in the State Register. Department personnel will then take appropriate steps to inform the regulated community of the

amendment. Additionally, a copy of the regulation will be posted on the Department's website, accessible at www.scdhec.gov/regulations-table. Printed copies may also be requested, for a fee, from the Department's Freedom of Information Office.

**DETERMINATION OF NEED AND REASONABLENESS OF THE PROPOSED REGULATION
BASED ON ALL FACTORS HEREIN AND EXPECTED BENEFITS:**

The Department proposes to amend R.61-9.122.23 to maintain consistency with federal regulations and to improve regulatory clarity.

DETERMINATION OF COSTS AND BENEFITS:

Amending R.61-9.122.23 for consistency with federal regulations will increase the efficiency of processing facility applications, which will be a benefit to the regulated community and the state. There is no anticipated increase in costs to the state or its political subdivisions, or to the regulated community, resulting from these proposed revisions. It is anticipated that these proposed revisions will result in cost savings to the regulated community.

UNCERTAINTIES OF ESTIMATES:

There are no uncertainties of estimates relative to the costs to the state or its political subdivisions.

EFFECT ON THE ENVIRONMENT AND PUBLIC HEALTH:

The proposed revisions to R.61-9.122 will provide continued protection of the environment and human health in accordance with updates to federal law.

**DETRIMENTAL EFFECT ON THE ENVIRONMENT AND PUBLIC HEALTH IF THE REGULATION
IS NOT IMPLEMENTED:**

There is no anticipated detrimental effect on the environment and public health if the regulation is not implemented. Adoption of these proposed revisions will ensure consistency with federal requirements and provide continued protection of the environment and human health in accordance with updates to federal law.

Text:

~~Indicates Matter Stricken~~

Indicates New Matter

61-9.122. The National Pollutant Discharge Elimination System.

Statutory Authority: Sections 48-1-10 et seq. and Sections 48-14-10 et seq.

Amend R.61-9.122.23, Concentrated animal feeding operations, to read:

122.23. Concentrated animal feeding operations.

(a) ~~Permit requirement for CAFO Scope.~~ Concentrated animal feeding operations (CAFOs), as defined in paragraph (b) of this section or designated in accordance with paragraph (c) of this section, are point sources ~~that require NPDES permits for discharges or potential discharges, subject to NPDES permitting~~

requirements as provided in this section. Once an animal feeding operation is defined as a CAFO for at least one type of animal, the NPDES requirements for CAFOs apply with respect to all animals in confinement at the operation and all manure, litter, and process wastewater generated by those animals or the production of those animals, regardless of the type of animal.

(b) Definitions applicable to this section:

(1) "Animal feeding operation (AFO)" means a lot or facility (other than an aquatic animal production facility) where the following conditions are met:

~~—(i) where the following conditions are met:~~

~~—(A)(i)~~ Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of forty-five (45) days or more in any twelve (12)-month period, and

~~—(B)(ii)~~ Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

~~—(ii) Two or more AFO under common ownership are considered to be a single AFO for the purposes of determining the number of animals at an operation if they adjoin each other or if they use a common area or system for the disposal of wastes.~~

(2) "Concentrated animal feeding operation (CAFO)" means an AFO that is defined as a Large CAFO or as a Medium CAFO by the terms of this paragraph, or that is designated as a CAFO in accordance with paragraph (c) of this section. Two or more AFOs under common ownership are considered to be a single AFO for the purposes of determining the number of animals at an operation, if they adjoin each other or if they use a common area or system for the disposal of wastes.

(3) The term "land application area" means land under the control of an AFO owner or operator, whether it is owned, rented, or leased, to which manure, litter, or process wastewater from the production area is or may be applied.

(4) "Large concentrated animal feeding operation (Large CAFO).": An AFO is defined as a Large CAFO if it stables or confines as many as or more than the numbers of animals specified in any of the following categories:

(i) 700 mature dairy cows, whether milked or dry;

(ii) 1,000 veal calves;

(iii) 1,000 cattle other than mature dairy cows or veal calves. The term cattle includes but is not limited to heifers, steers, bulls, and cow/calf pairs;

(iv) 2,500 swine, each weighing ~~55~~fifty-five pounds (55 lbs) or more;

(v) 10,000 swine, each weighing less than ~~55~~fifty-five pounds (55 lbs);

(vi) 500 horses;

(vii) 10,000 sheep or lambs;

(viii) 55,000 turkeys;

(ix) 30,000 laying hens or broilers, if the AFO uses a liquid manure handling system;

(x) 125,000 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;

(xi) 82,000 laying hens, if the AFO uses other than a liquid manure handling system;

(xii) 30,000 ducks, if the AFO uses other than a liquid manure handling system; or

(xiii) 5,000 ducks, if the AFO uses a liquid manure handling system.

(5) The term "manure" is defined to include manure, bedding, compost, and raw materials or other materials commingled with manure or set aside for disposal.

(6) "Medium concentrated animal feeding operation (Medium CAFO).": The term Medium CAFO includes any AFO with the type and number of animals that fall within any of the ranges listed in paragraph (b)(6)(i) of this section and which has been defined or designated as a CAFO. An AFO is defined as a Medium CAFO if:

(i) The type and number of animals that it stables or confines falls within any of the following ranges:

(A) 200 to 699 mature dairy cows, whether milked or dry;

(B) 300 to 999 veal calves;

(C) 300 to 999 cattle other than mature dairy cows or veal calves. The term cattle includes, but is not limited to, heifers, steers, bulls, and cow/calf pairs;

(D) 750 to 2,499 swine each weighing ~~55~~fifty-five pounds (55 lbs) or more;

(E) 3,000 to 9,999 swine each weighing less than ~~55~~fifty-five pounds (55 lbs);

(F) 150 to 499 horses;

(G) 3,000 to 9,999 sheep or lambs;

(H) 16,500 to 54,999 turkeys;

(I) 9,000 to 29,999 laying hens or broilers, if the AFO uses a liquid manure handling system;

(J) 37,500 to 124,999 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;

(K) 25,000 to 81,999 laying hens, if the AFO uses other than a liquid manure handling system;

(L) 10,000 to 29,999 ducks, if the AFO uses other than a liquid manure handling system; or

(M) 1,500 to 4,999 ducks, if the AFO uses a liquid manure handling system; and

(ii) Either one of the following conditions is met:

(A) Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or

(B) Pollutants are discharged directly into waters of the United States which originate outside of the facility and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

(7) "Process wastewater" means 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 watering 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.

(8) "Production area" means 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~~ milkrooms, 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.

(9) "Small concentrated animal feeding operation (Small CAFO).": An AFO that is designated as a CAFO and ~~that is not a Medium CAFO.~~

(c) How may an AFO be designated as a CAFO? The appropriate authority (i.e., the Department or Regional Administrator, or both, as specified in paragraph (c)(1) of this section) may designate any AFO as a CAFO upon determining that it is a significant contributor of pollutants to waters of the United States.

(1) Who may designate? ~~In South Carolina, CAFOs~~ Designations may be made by the Department. The Regional Administrator may also designate CAFOs ~~in South Carolina~~ but only where the Regional Administrator has determined that one or more pollutants in the AFO's discharge contributes to an impairment in a downstream or adjacent state or Indian country water that is impaired for that pollutant.

(2) In making this designation, the Department or the Regional Administrator shall consider the following factors:

(i) The size of the AFO and the amount of wastes reaching waters of the United States;

(ii) The location of the AFO relative to waters of the United States;

(iii) The means of conveyance of animal wastes and process wastewaters into waters of the United States;

(iv) The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes, manure, and process ~~waste waters~~ wastewaters into waters of the United States; and

(v) Other relevant factors.

(3) No AFO shall be designated under this paragraph unless the Department or the Regional Administrator has conducted an on-site inspection of the operation and determined that the operation should and could be regulated under the permit program. In addition, no AFO with numbers of animals below those established in paragraph (b)(6) of this section may be designated as a CAFO unless:

(i) Pollutants are discharged into waters of the United States through a manmade ditch, flushing system, or other similar man-made device; or

(ii) Pollutants are discharged directly into waters of the United States which originate outside of the facility and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

(d) ~~Who must seek coverage under an NPDES permit?~~ NPDES permit authorization –

(1) ~~All CAFO owners or operators must apply for a permit. All CAFO owners or operators 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. Permit Requirement. A CAFO must not discharge unless the discharge is authorized by an NPDES permit. In order to obtain authorization under an NPDES permit, 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.~~

(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. Information to submit with permit application or notice of intent. An application for an individual permit must include the information specified in section 122.21. A notice of intent for a general permit must include the information specified in sections 122.21 and 122.28.

(3) Information to submit with permit application. A permit application for an individual permit must include the information specified in section 122.21. A notice of intent for a general permit must include the information specified in sections 122.21 and 122.28.

(e) Land application discharges from a CAFO are subject to NPDES requirements. The discharge of manure, litter, or process wastewater to waters of the United States from a CAFO as a result of the application of that manure, litter, or process wastewater by the CAFO to land areas under its control is a discharge from that CAFO subject to NPDES permit requirements, except where it is an agricultural ~~storm water~~ stormwater discharge as provided in 33 U.S.C. 1362(14). For purposes of this paragraph, where the manure, litter, or process wastewater has been applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater, as specified in section 122.42(e)(1)(vi) through (ix), a precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO is an agricultural ~~storm water~~ stormwater discharge.

(1) For unpermitted Large CAFOs, a precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO shall be considered an agricultural stormwater discharge only where the manure, litter, or process wastewater has been land applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater, as specified in section 122.42(e)(1)(vi) through (ix).

(2) Unpermitted Large CAFOs must maintain documentation specified in section 122.42(e)(1)(ix) either on site or at a nearby office, or otherwise make such documentation readily available to the Department or Regional Administrator upon request.

—(f) “No potential to discharge” determinations for Large CAFO.

—(1) Determination by the Department. The Department, upon request, may make a case specific determination that a Large CAFO has “no potential to discharge” pollutants to waters of the State. In making this determination, the Department must consider the potential for discharges from both the production area and any land application areas. The Department must also consider any record of prior discharges by the CAFO. In no case may the CAFO be determined to have “no potential to discharge” if it has had a discharge within the 5 years prior to the date of the request submitted under paragraph (f)(2) of this section. For purposes of this section, the term “no potential to discharge” means that there is no potential for any CAFO manure, litter, or process wastewater to be added to waters of the State under any circumstance or climatic condition. A determination that there is “no potential to discharge” for purposes of this section only relates to discharges of manure, litter, and process wastewater covered by this section.

—(2) Information to support a “no potential to discharge” request. In requesting a determination of “no potential to discharge”, the CAFO owner or operator must submit any information that would support such a determination, within the time frame provided by the Department and in accordance with paragraphs (g) and (h) of this section. Such information must include all of the information specified in sections 122.21(f) and (i)(1)(i) through (ix). The Department has discretion to require additional information to supplement the request and may also gather additional information through on-site inspection of the CAFO.

—(3) Process for making a “no potential to discharge” determination. Before making a final decision to grant a “no potential to discharge” determination, the Department must issue a notice to the public stating that a “no potential to discharge” request has been received. This notice must be accompanied by a fact sheet which includes, when applicable, a brief description of the type of facility or activity which is the subject of the “no potential to discharge” determination; a brief summary of the factual basis upon which the request is based for granting the “no potential to discharge” determination; and a description of the procedures for reaching a final decision on the “no potential to discharge” determination. The Department must base the decision to grant a “no potential to discharge” determination on the administrative record, which shall include all information submitted in support of a “no potential to discharge” determination and any other supporting data gathered by the permitting authority. The Department must notify any CAFO seeking a “no potential to discharge” determination of its final determination within 90 days of receiving the request.

—(4) What is the deadline for requesting a “no potential to discharge” determination? The owner or operator must request a “no potential to discharge” determination by the applicable permit application date specified in paragraph (g) of this section. If the Department’s final decision is to deny the “no potential to discharge” determination, the owner or operator must seek coverage under a permit within 30 days after the denial.

—(5) The “no potential to discharge” determination does not relieve the CAFO from the consequences of an actual discharge. Any unpermitted CAFO that discharges pollutants into the waters of the State is in

violation of the Clean Water Act and PCA even if it has received a "no potential to discharge" determination from the Department. Any CAFO that has received a determination of "no potential to discharge", but who anticipates changes in circumstances that could create the potential for a discharge, should contact the Department and apply for and obtain permit authorization prior to the change of circumstances.

~~— (6) The Department retains authority to require a permit. Where the Department has issued a determination of "no potential to discharge", the Department retains the authority to subsequently require NPDES permit coverage if circumstances at the facility change, if new information becomes available, or if there is another reason for the Department to determine that the CAFO has a potential to discharge.~~

~~— (g) When must a CAFO seek coverage under an NPDES permit?~~

~~— (1) Operations defined as CAFO prior to the effective date of this regulation. For operations that are defined as CAFO under regulations that are in effect prior to the effective date of this regulation, the owner or operator must have or seek to obtain coverage under an NPDES permit as of the effective date of this regulation and comply with all applicable NPDES requirements, including the duty to maintain permit coverage in accordance with paragraph (h) of this section.~~

~~— (2) Operations defined as CAFO as of the effective date of this regulation, who were not defined as CAFO prior to that date. For all CAFO, the owner or operator of the CAFO must seek to obtain coverage under an NPDES permit by a date specified by the Department, but no later than February 13, 2006.~~

~~— (3) Operations that become defined as CAFO after the effective date of this regulation, but which are not new sources. For newly constructed AFO and AFO that make changes to their operations that result in becoming defined as CAFO for the first time, after the effective date of this regulation, but that are not new sources, the owner or operator must seek to obtain coverage under an NPDES permit, as follows:~~

~~— (i) For newly constructed operations not subject to effluent limitations guidelines, 180 days prior to the time CAFO commences operation or~~

~~— (ii) For other operations (e.g., resulting from an increase in the number of animals), as soon as possible, but no later than 90 days after becoming defined as a CAFO; except that~~

~~— (iii) If an operational change that makes the operation a CAFO would not have made it a CAFO prior to the effective date of this regulation, the operation has until April 13, 2006, or 90 days after becoming defined as a CAFO, whichever is later.~~

~~— (4) New sources. New sources must seek to obtain coverage under a permit at least 180 days prior to the time that the CAFO commences operation.~~

~~— (5) Operations that are designated as CAFO. For operations designated as a CAFO in accordance with paragraph (c) of this section, the owner or operator must seek to obtain coverage under a permit no later than 90 days after receiving notice of the designation.~~

~~— (6) No potential to discharge. Notwithstanding any other provision of this section, a CAFO that has received a "no potential to discharge" determination in accordance with paragraph (f) of this section is not required to seek coverage under an NPDES permit that would otherwise be required by this section. If circumstances materially change at a CAFO that has received a NPTD determination, such that the CAFO has a potential for a discharge, the CAFO has a duty to immediately notify the Department and seek coverage under an NPDES permit within 30 days after the change in circumstances.~~

~~—(h) Duty to Maintain Permit Coverage. No later than 180 days before the expiration of the permit, the permittee must submit an application to renew its permit in accordance with section 122.21(g). However, the permittee need not continue to seek continued permit coverage or reapply for a permit if:~~

~~—(1) The facility has ceased operation or is no longer a CAFO and~~

~~—(2) The permittee has demonstrated to the satisfaction of the Department that there is no remaining potential for a discharge of manure, litter or associated process wastewater that was generated while the operation was a CAFO, other than agricultural storm water from land application areas.~~

(f) By when must the owner or operator of a CAFO have an NPDES permit if it discharges? A CAFO must be covered by a permit at the time that it discharges.

(g) [Reserved]

(h) Procedures for CAFOs seeking coverage under a general permit.

(1) CAFO owners or operators must submit a notice of intent when seeking authorization to discharge under a general permit in accordance with section 122.28(b). The Department must review notices of intent submitted by CAFO owners or operators to ensure that the notice of intent includes the information required by section 122.21(i)(1), including a nutrient management plan that meets the requirements of section 122.42(e) and applicable effluent limitations and standards, including those specified in 40 CFR part 412. When additional information is necessary to complete the notice of intent or clarify, modify, or supplement previously submitted material, the Department may request such information from the owner or operator. If the Department makes a preliminary determination that the notice of intent meets the requirements of sections 122.21(i)(1) and 122.42(e), the Department must notify the public of the Department's proposal to grant coverage under the permit to the CAFO and make available for public review and comment the notice of intent submitted by the CAFO, including the CAFO's nutrient management plan, and the draft terms of the nutrient management plan to be incorporated into the permit. The process for submitting public comments and hearing requests, and the hearing process if a request for a hearing is granted, must follow the procedures applicable to draft permits set forth in 40 CFR 124.11 through 124.13. The Department may establish, either by regulation or in the general permit, an appropriate period of time for the public to comment and request a hearing that differs from the time period specified in 40 CFR 124.10. The Department must respond to significant comments received during the comment period, as provided in 40 CFR 124.17, and, if necessary, require the CAFO owner or operator to revise the nutrient management plan in order to be granted permit coverage. When the Department authorizes coverage for the CAFO owner or operator under the general permit, the terms of the nutrient management plan shall become incorporated as terms and conditions of the permit for the CAFO. The Department shall notify the CAFO owner or operator and inform the public that coverage has been authorized and of the terms of the nutrient management plan incorporated as terms and conditions of the permit applicable to the CAFO.

(2) For EPA-issued permits only. The Regional Administrator shall notify each person who has submitted written comments on the proposal to grant coverage and the draft terms of the nutrient management plan or requested notice of the final permit decision. Such notification shall include notice that coverage has been authorized and of the terms of the nutrient management plan incorporated as terms and conditions of the permit applicable to the CAFO.

(3) Nothing in this paragraph (h) shall affect the authority of the Department to require an individual permit under section 122.28(b)(3).

ATTACHMENT B

DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

CHAPTER 61

Statutory Authority: 1976 Code Sections 48-1-10 et seq.

Notice of Drafting:

The Department of Health and Environmental Control ("Department") proposes amending R.61-9, Water Pollution Control Permits. Interested persons may submit comment(s) on the proposed amendments to Ann Clark of the Bureau of Water; S.C. Department of Health and Environmental Control, 2600 Bull Street, Columbia, S.C. 29201; clarkar@dhec.sc.gov. To be considered, the Department must receive comments no later than 5:00 p.m. on August 22, 2022, the close of the Notice of Drafting comment period.

Synopsis:

Pursuant to the South Carolina Pollution Control Act, S.C. Code Ann. 48-1-10 et seq., the Department establishes programs to regulate discharges from point sources including concentrated animal feeding operations. The Department proposes to amend R.61-9.122, The National Pollutant Discharge Elimination System. The amendment will remove the existing language of R.61-9.122.23, Concentrated animal feeding operations, and replace it with language that is consistent with current federal regulation 40 CFR Section 122.23. The requirement for South Carolina to include regulations in conformance with the federal regulation is stated at 40 CFR Section 123.25(a)(6).

The proposed amendment may also include corrections for clarity and readability, grammar, punctuation, codification, and other such regulatory text improvements.

The Administrative Procedures Act, S.C. Code Section 1-23-120(H)(1), exempts this amendment from General Assembly review, as the Department proposes this amendment for compliance with federal law.

ATTACHMENT C

SUMMARY OF PUBLIC COMMENTS AND DEPARTMENT RESPONSES

R.(61-9, *Water Pollution Control Permits*)

As of August 22, 2022, close of the Notice of Drafting comment period:

Name	Section
Southern Environmental Law Center	Notice of Drafting, to Amend R.61-9.122, National Pollution Discharge Permits
Comment: See attached letter	
Department Response: Department will respond along with other comments received during comment period on the Notice of Proposed Regulation.	
Name	Section
Comment:	
Department Response:	
Name	Section
Comment:	
Department Response:	

ATTACHMENT D
SOUTHERN ENVIRONMENTAL COMMENT LETTER
AUGUST 22, 2022

SEE NEXT PAGE

August 22, 2022

Via Email

Ann Clark
SC Department of Health and Environmental Control, Bureau of Water
2600 Bull Street
Columbia, South Carolina 29201
clarkar@dhec.sc.gov

**Re: Notice of Drafting, to Amend R.61-9.122, National Pollution Discharge
Elimination System**

Dear Ms. Clark:

The Southern Environmental Law Center (“SEL”), on behalf of Sierra Club, Congaree Riverkeeper, Winyah Rivers Alliance, Audubon South Carolina, South Carolina Wildlife Federation, South Carolina Environmental Law Project, South Carolina Native Plant Society, and the Coastal Conservation League, submits these comments on the Department of Health and Environmental Control’s (“DHEC’s”) Notice of Drafting to Amend S.C. Reg. 61.9-122 (“Notice”), which regulates discharges from point sources, including concentrated animal feeding operations (“CAFOs”). DHEC claims this regulatory change is exempt from General Assembly review because it is required to maintain compliance with federal law. *See* S.C. Code § 1-23-120(H)(1) (“General Assembly review is not required for regulations promulgated[.] . . to maintain compliance with federal law[.]”). As explained below, DHEC’s claim is erroneous and is a transparent attempt to avoid complying with *Blackmon v. SC DHEC*, 436 S.C. 529 (S.C. Ct. App. 2022).

As a preliminary matter, DHEC provides little information in its Notice regarding the nature of the proposed amendments or justification for exempting the changes from General Assembly review. This makes it difficult for the public to consider whether DHEC’s claimed exemption is warranted. It is also a violation of the South Carolina Administrative Procedure Act (“SC APA”), which requires notices of drafting to include “a synopsis of what the agency plans to draft.” S.C. Code Ann. 1-23-110(A)(1)(b). DHEC must provide enough information in its notices of drafting to provide the public with a meaningful opportunity to comment. Nevertheless, based on the minimal information provided by DHEC, we object to DHEC’s claim that these regulatory changes are necessary for compliance with federal law, and in turn exempt from General Assembly review.

South Carolina’s CAFO permitting regulations are fully authorized by federal law. DHEC’s Notice points to 40 C.F.R. § 123.25(a)(6) as the federal law “requiring” the proposed regulatory change. But section 123.25(a)(6) merely establishes that the federal requirements for

CAFO permitting are a regulatory floor. That is, state regulations must be at least as stringent as federal regulations, but “States are *not* precluded from omitting or modifying any provisions to impose more stringent requirements[.]” 40 C.F.R. § 123.25(a). South Carolina’s regulations do just that. As the South Carolina Court of Appeals explained in *Blackmon*, “[t]he South Carolina [CAFO] regulations . . . are based not only on the federal [National Pollutant Discharge Elimination System] regulations but also upon the South Carolina Pollution Control Act, which specifically authorizes the Department to ‘prevent pollution[.]’” in turn justifying South Carolina’s more stringent regulations. 436 S.C. at 542; *compare Waterkeeper Alliance, Inc v. US EPA*, 399 F.3d 486, 504 (2d Cir. 2005) (concluding that federal law regulates only *actual discharges* of pollutants), *with Blackmon*, 436 S.C. at 542 (explaining that, in addition to regulating actual discharges of pollutants as required by federal law, South Carolina law provides *additional* regulatory authority to *prevent* pollution). Because South Carolina’s existing CAFO regulations are fully authorized by federal law, the proposed amendment is not necessary to maintain compliance with federal law, nor is it exempt from review by the General Assembly.

Aside from failing to comply with the SC APA and attempting to circumvent General Assembly review, it is troubling that this is DHEC’s response to *Blackmon*. The court in *Blackmon* confirmed that South Carolina’s laws and regulations provide a higher level of protection for South Carolina waterways than federal law and found that DHEC was failing to enforce those higher standards—to the detriment of water quality in our State. Apparently DHEC’s response to this decision was not to begin enforcing South Carolina law and protecting South Carolina residents and waterways, but to strip South Carolina’s CAFO regulations of additional safeguards, making them demonstrably less protective and failing to address the threat that excessive, improper, and poorly regulated land application of animal waste poses to our State’s waterways. We urge DHEC to ensure the protection and improvement of water quality in South Carolina by abandoning this unnecessary and harmful amendment process intended to weaken oversight of large CAFOs in the State.

Sincerely,

/s/ Emily Wyche

Southern Environmental Law Center
525 East Bay Street, Suite 200
Charleston, South Carolina 29403

Cc (via email only):

Bob Guild, Sierra Club

Bill Stangler, Congaree Riverkeeper

Debra Buffkin, Winyah Rivers Alliance

Trip King, Audubon South Carolina and South Carolina Wildlife Federation

Sara Green, South Carolina Wildlife Federation

Leslie Lenhardt, South Carolina Environmental Law Project

Rick Huffman, South Carolina Native Plant Society Betsy La

Force, Coastal Conservation League

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

RECEIVED

SEP 19 2022

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,

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.

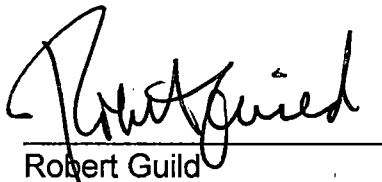
PROOF OF SERVICE

The undersigned hereby certifies that he has this date served upon the below-named at the addresses set forth via first class mail the Return to Joint Petition for Rehearing:

Mr. Mitchell Willoughby, Esquire
PO Box 8416
Columbia, SC 29202-8416

Ms. Sara Volk Martinez, Esquire
2600 Bull Street
Columbia, SC 29201

Mr. Stephen Phillip Hightower, Esquire
2600 Bull Street
Columbia, SC 29201



Robert Guild
S.C. Bar No. 2358
314 Pall Mall Street
Columbia, SC 29201
Attorney for Appellants
Charles S. Blackmon and
South Carolinians for Responsible Agricultural Practices

September 16, 2022

ROBERT GUILD

Attorney at Law

314 Pall Mall • Columbia, South Carolina 29201 • 803-252-1419 • bguild@mindspring.com

September 16, 2022

The Honorable V. Claire Allen
Chief Deputy Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

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SEP 19 2022
SC Court of Appeals

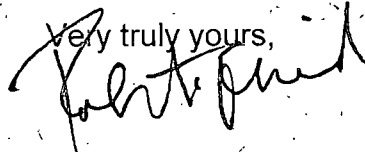
Re: Charles S. Blackmon v. SCDHEC
Appellate Case No: 2017-002598

Dear Ms. Allen:

Enclosed please find for filing the original and six (6) copies of the Return to Joint Petition for Rehearing, together with Proof of Service reflecting service upon the other parties.

With kind regards, I am

Very truly yours,



Robert Guild

CC: All Counsel





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